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THE NEGRO IN OUR LAW

Eugene V. Rostow

THE SUPPRESSION OF THE
Nauvoo Expositor

Dallin H. Oaks

THE UNIFORM COMMERCIAL CODE
IN UTAH — PART I

Ronald N. Boyce

THIRD-PARTY LIABILITY UNDER
WORKMEN'S COMPENSATION LAW

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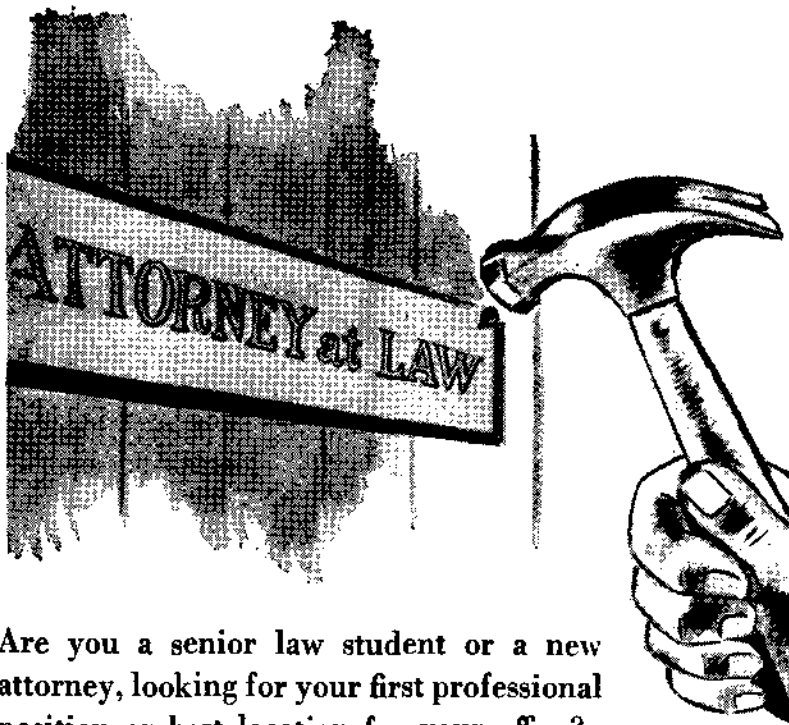
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The Negro in Our Law

By Eugene V. Rostow*

It is a high compliment to have been asked to give the William H. Leary Lecture. Dean Leary was a notable figure in a great generation of law teachers. He left an enduring monument in the quiet strength of this College of Law, and in the affectionate recollection in which he is held by his students, his colleagues and his fellow citizens. I am pleased to be allowed to help celebrate his work. I hope, in our turn, that we in this generation build half as well.

It is a compliment, too, to have been included among my predecessors. I know, admire, and respect all four of the Leary Lecturers who have been here before, and I am honored to be listed with them. And finally, most important of all, to my mind, I am delighted that your distinguished Dean and his lively colleagues thought to invite me.

As I told Dean Thurman when we made the arrangements for this evening, I have been trying to complete a book about the status of the Negro in our law, and in this paper, with his permission and approval, I shall try to summarize some of the findings of that study.

I.

One could start the story at any one of a number of points. I might state my theme in its most general form by recalling *Somerset's* case.¹

In 1769, a Virginian named Stewart or Steuart took one of his slaves with him on a business trip to England. The slave's name is given as James Somerset or Sommersett. He left his master in 1771. Stewart then had Somerset seized and placed in irons on a ship in the Thames, planning to send him to Jamaica, and there to sell him for plantation work. Somerset's friends applied for a writ of habeas corpus, which came before Lord Mansfield, who referred it to the whole Court of King's Bench. The case was argued at length, and with fervor, exciting considerable general interest.² There are several versions of Mansfield's opinion freeing Somerset.³

Lord Mansfield refused to give effect in England to the master's authority over the slave derived from the law of Virginia, even though Virginia was then a colony in which slavery had been authorized by act of the British Parliament. It was plausibly argued that slavery, like marriage, for example, and other relations of status, should be considered in the light of the law of the state where the relationship was formed and where master and slave were domiciled —

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¹ *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

² See 2 BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 476-77 (Hill ed. Powell rev. 1934); 3 *id.* at 87, 212. Lord Mansfield refers with approval to the arguments of counsel and adds, "I cannot omit to express particular happiness in seeing young men, just called to the Bar, have been able so much to profit by their reading." *Somerset v. Stewart*, Lofft 1, 18, 98 Eng. Rep. 499, 509 (K.B. 1772). He assumed that the decision would free 14,000 or 15,000 slaves then living in England. *Id.* at 17, 98 Eng. Rep. 509.

³ Note 1 *supra*; 20 How. St. Tr. 1, 1369 (K.B. 1772).

in this instance, Virginia. Following this line of thought, counsel for Stewart, in the name of comity, asked the court to treat the legal relationship between master and slave as valid in England because it was valid in Virginia. But Lord Mansfield said that "So high an act of dominion must be recognized by the law of the country where it is used. . . . The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law."⁴ There being no positive law, a phrase by which he probably meant no legislation or binding precedent authorizing such slavery in England, Lord Mansfield concluded, "I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."⁵

Mansfield's position has powerful echoes of the Roman law, where slavery was regarded as contrary to the law of nature. It was generally said by the Roman lawyers that slavery could be upheld only on the basis of customary law, *ius gentium*.⁶

Cardozo, invoking Mansfield with Marshall to illustrate the magisterial style in writing opinions, was once misled into quoting from a more eloquent passage with which Campbell had embellished Mansfield's prose:

I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. . . . Villainage, when it did exist in this country, differed in many particulars from West India slavery. . . . At any rate villainage has ceased in England, and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it.⁷

However authentic the rhetoric attributed to Mansfield's opinion may be, the court's decision in *Somerset* was clear: let the black go free.

This was the law of England in the 1770's.⁸ It was not then the law of the American colonies, and for many long years it was not the law of the United States. One must add that it is not even now the law in fact in every part of the United States.

⁴ *Somerset v. Stewart*, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772).

⁵ *Ibid.* The judge conceded that contracts for the sale of slaves were enforceable at law in English courts. *Id.* at 17, 98 Eng. Rep. at 509.

⁶ JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 105, 135-38, 269-71 (2d ed. 1952).

⁷ CARDOZO, LAW AND LITERATURE 13-14 (1931); see 4 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 133-35 (1899). The final flourish echoes a remark in *Cartwright's case* as reported in 2 RUSHWORTH, HISTORICAL COLLECTION 468 (1721), where the court did indeed say that "England was too pure an Air for Slaves to breath in."

⁸ *Somerset* leaves many legal questions unanswered: Did the writ, for example, dissolve the relation of slavery, like a bill of divorcement, or only deny the master the power to exercise any control over the slave in England? What would happen to the relationship if the master and slave returned to Virginia after a sojourn in England — the exact factual analogue to the *Dred Scott* case less than a hundred years later. In 1827, Lord Stowell answered that question as the Supreme Court did in *Dred Scott*, in the case of *The King v. Allen*, 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827) (popularly known as *The Slave Grace case*); cf. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). See also 1 W.W. STORY, LIFE AND LETTERS OF JOSEPH STORY 558 (1851).

Yet in the 1770's, and throughout our history as a nation, every judge, and every thoughtful man, knew that the principle of *Somerset's* case should have been our law too. That conviction, like the knowledge of evil, has been the source of much in our law, and in our lives: a restless, uneasy pressure for change; a sense of guilt; a zeal for liberty.

This is the topic with which I shall try to deal here — the place of the Negro in our law, why it was what it was, and how it became what it is today.

I should begin by making it clear that my work is not drawn from fresh research in the vast archives of the subject. It is, rather, an attempt at reflection and observation intended to help us govern the future by examining it in the perspective of the past.

For I am of the school that views policymaking as the goal of historical studies, as it is the proper goal of every other approach to the study of society. We renew contact with what came before not in the spirit of nostalgia or anti-quarianism, but because we know that the memories of our experience as a people, conscious and unconscious, play a large part in determining what we are and how we perceive the world around us. The forces that shape our national personality and character correspondingly restrict our freedom of choice. They define the range within which planned change is possible at any moment of time. And they prescribe the hierarchy of values we seek to fulfill in making such choices as are in fact open to us.

I have two general themes in mind.

The first is the inherent importance of the problem. From whatever vantage point we view our history, and the prospects for its future, the status of the Negro is a central and a tormenting issue. Fundamental conflict over the legal position of the Negro was a basic element in the constitutional system launched in 1787, and variant forms of that conflict have been key factors in almost every stage of its development since. The clash between our professed principles and the Negro's place in society has been the essence of the compromises, in war and in peace, through which we have sought one equilibrium after another in adding states to the Union and in defining and redefining the relative authority of the states and of the nation. The question of rights, privileges and immunities for the Negro has been a crucial factor in determining the underlying alliances of the political order throughout our experience as a republic. And the Negro's plea for recognition as a human being, "created equal," and, therefore, entitled to equal treatment by the law, has been and is the haunting cry which never quite stops echoing in our inner ear, however strong the opposing forces of custom and racial feeling. In recent years, it has been a moving force requiring growth in almost every distinguishable branch of constitutional law, and in many other areas of law as well, from libel and reapportionment to wills, contempt of court, and the law of covenants which do and do not run with the land. Once the country came to agree with the Supreme Court that the Emperor was indeed naked — that our treatment of the Negro has been completely contrary to the most sacred principles of our polity — the idea of the New Model in our law and social arrangements spread with startling rapidity.

My second broad interest here is the richness of the topic as a case study in legal theory. The place of the Negro in our legal system offers a unique opportunity to examine the role of law in the social process, and of the social process in the formation of law. After all, our spectrum extends from chattel slavery — and our law of slavery was the worst in the history of law — past *Dred Scott*,⁹ the Civil War, and the *Civil Rights Cases*¹⁰ of 1883 to the extraordinary progress in the direction of equal rights for the Negro made in recent years by the Supreme Court, the Congress, and the people themselves. Such an examination requires us to test all the dazzling hypotheses of legal philosophy about the nature and purposes of law, and about its relationships to custom, reason, authority, morals, and the idea of justice. It permits us to distinguish theories which are consistent with experience from those which are not. In the nature of knowledge, this is an indispensable task. For theories — that is, sets or systems of propositions about reality — can never be proved true. They can, however, be shown to be untrue by demonstrating that our best measures of the external world, approximate as they necessarily are, are incompatible with propositions logically deduced from a particular theory about it. In this way we can at least narrow our search for explanations, and direct our attention to the factors most likely to prove fruitful in revealing the nature of the social process.

What I have particularly in mind is the part which moral elements — that is, both mores and aspiration — play in the process of making law. These are much controverted issues, and my views are not very stylish, I fear. But I should contend that the student of law evades his principal responsibility, and his most difficult one, if he takes an exclusively analytical, linguistic, and positivist approach to law. We saw again this last week the extraordinary phenomenon of a Southern white jury refusing to convict a white man who had almost surely killed a white civil rights worker. The event leaves us with the hollow proposition that under the actual living law of Alabama today, the law at the end of the policeman's stick, the law twelve men in the jury box will enforce, such homicide is not yet a crime. We know that if this rule be in fact the law, it is bad law. What criteria permit us to reach this conviction? What forces in our society, and in the nature of law, can lead such jurors to change their minds? Law is not a passive factor in the movement of society, although it must often defer to forces which for the moment have the larger battalions. Law responds to other social forces, but in turn, and through time, it shapes and influences them.

The status of the Negro in American law is not a pretty story, nor one for squeamish stomachs. It does not permit us to evade the share which inhumanity has played, and plays still, in human affairs, when the strong have a chance to hurt the weak. It does not allow us to forget how close to the surface primitive savagery is, and how powerful the beast within. Here, in sharp and often painful focus, we see the full array of passions and interests which enter into destiny: the force of habit, of greed, and of fear; the power and the weakness of conscience and religion; the thrust of dark passions and aggressive instincts

⁹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁰ 109 U.S. 3 (1883).

that civilization must always seek to tame, or at least to confine; the mysterious impact of war on men and on societies; the contribution great men and women can sometimes make, if they are in the right places at the right times; the ways in which social change occurs, often, usually, in what seem to be sudden sharp bursts after long periods of latency.

The chronicle is one of horror, but not only of horror. Our treatment of the Negro has created a constant tension between the actual and the acknowledged ideal in our lives. Many chapters of the story are degrading and disgraceful. But the presence of the Negro has been a perpetual challenge to the Puritan spirit at the heart of our psyche. It has required moral exertion of us and given martyrs and heroes their occasions of glory. Thus, the moral element in our affairs has been strengthened and deepened to become their ruling power.

II.

The slavery of the American colonies was not an isolated phenomenon. In part, it represented a survival into the nineteenth century of ancient forms of human subjugation, which even the new birth of freedom during the late eighteenth century could not quite extinguish. In part, however, it represented something quite different: a large-scale adaptation of the ancient tradition of slavery to the imperative demand of the new world for manpower. Slavery increased rapidly in the seventeenth and eighteenth centuries. With immigration and the transportation of indentured servants, it became one of the basic means for providing enough labor to clear the wilderness in most parts of North, South, and Central America. The colonizing labor force contained indentured white men as well as Negro slaves, especially during the seventeenth and early eighteenth centuries — refugees and scoundrels, followers of the Young Pretender and other lost causes, adventurers, peasants forced or induced to migrate, huge numbers of men who bonded themselves for two to eight years in exchange for passage and support. Until it was outstripped by slavery in the middle of the eighteenth century, indentured servitude was the chief form of labor in the Middle Atlantic and Southern North American colonies, and it continued to exist until well after the Revolution. The best estimate is that half the white population south of New England in the colonial period came to America as indentured servants — men recruited in Europe almost as brutally as the blacks were mobilized in Africa, and were treated almost as badly on the journey, and in their places of work.

The status of indentured servants was quite as low as that of black slaves. Their contracts could be sold. They were not allowed to vote, to hold land, to engage in trade, or to serve on juries. They could not marry without the consent of their masters, and they were subject to corporal punishment by the master. The control of rebellious indentured servants was a major problem of public order in most of the American colonies and a major source of humanitarian complaint, both in America and in Britain. Many tricks were used to extend their nominal terms, and they became accustomed to degradation. One of the fascinating hypotheses about social experience advanced in recent years

by Rossiter and others is that the indentured servants of colonial times, deeply injured by their experience, became not the sturdy yeomen and independent artisans of Federalist America, but an intractable mass of backward Southern "poor-whites," the ancestors of the Snopes.¹¹

Historians seem generally to agree that Negro slavery developed strongly in the North American colonies only because white servitude could not produce a sufficient labor supply, especially for the colonies where plantation crops prevailed. Reports of the treatment of indentured servants reached Europe and made their recruitment more and more difficult. At the same time, the African slave trade became diabolically efficient, often with the cooperation of tribal chiefs. The first Negroes who came, in 1619, were probably not slaves at all. For fifty years or so, most Negroes who arrived or were brought here were indentured servants or free immigrants. The records notice several, perhaps many, who became free landholders, businessmen, and the masters of other servants. Some were given land under the headrights system — that is, they were given land grants of 50 acres for each European or African they brought into the colonies. In early times, slaves and indentured servants were treated equally badly. They lived together, without evidence of race feeling or caste distinction.

Soon, however, the treatment of the Negro became more severe, and the main features of American chattel slavery emerged. Correlatively, the South became attached to the conviction that its economy was unworkable without slavery. For many, this view was transformed into a doctrine justified by what they regarded as the Negro's inherent biological inferiority, by Biblical authority, and by natural right — a kind of "chosen people" doctrine. From the 1660's on — the time of the Restoration in England — slavery became the dominant but not the universal position of the Negro in the United States. Slavery itself took on its characteristic American features, notably different from those in the Spanish and Portuguese colonies. Slavery was perpetual and hereditary, and all sorts of presumptions and restraints developed to limit the possibility of freedom for the slave, even by the will or deed of his master. No official made inquiry about their humane treatment, as was the case in Spanish and Portuguese territory. They could not testify in courts, work for pay, own or inherit land, or obtain much legal protection, even against murder. It was a crime in many colonies and states to teach Negroes to read or to use firearms, or to sell them drink. They were punished more severely than white men for the same offenses. And running away was of course their ultimate crime.

As the institution of slavery crystallized, it affected the status of all Negroes, even the freed Negroes living in the North. They were a caste apart in the law of almost every state, except perhaps Vermont, with special provisions about voting, the ownership of land, crime, their status as witnesses, and so on.

¹¹ See ROSSITER, *SEEDTIME OF THE REPUBLIC* 91 (1953). See generally FARNAM, *CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860*, at 60-70 (1938). The generalization is hardly universal. Taney's ancestors were indentured servants. See LEWIS, *WITHOUT FEAR OR FAVOR* 7 (1965).

Thus a poison entered our lives and pervaded every aspect of them. The Negro was forced to wear a badge of degradation which only the proudest spirits could totally reject or ignore. Self-hatred, a lack of self-respect and self-confidence, inevitably colored almost every Negro's estimate of himself. The effect of our caste system has been almost worse for the Master Race. Both white and Negro Americans were schooled in habits which grip us still as corrosive memories.

Leading spirits in all the colonies protested against slavery, starting with the Quakers in 1671. Jefferson sought to have a paragraph against slavery and the slave trade put into the Declaration of Independence, and he proposed in 1779 that Virginia abolish slavery gradually. Tom Paine denounced it. George Washington favored emancipation, and his will directed that all his slaves be freed on his widow's death. Judge Tucker of Virginia wrote an early book against slavery, and the Congregational preachers of New England, starting with Jonathan Edwards, Ezra Stiles, and Leonard Bacon, took the lead in preparing public opinion for the abolitionists of the generation which began with Garrison's first number of the *Liberator* in 1830.¹²

While there was considerable progress toward liberty in the North during the era of the Revolution, the egalitarianism of the Declaration of Independence was only rarely and gradually applied to the status of the slave. Not many saw the paradoxical contrast between the social ideals of the Declaration and the position of the Negro — and of women, for that matter. As late as the mid-nineteenth century, the most humane and compassionate opinion — that of Lincoln or Monroe, for example — was that the Negro was an unfortunate person of inferior attainments, treated very badly by the whites, to be sure, but not conceivably the white man's equal. For such men, the right solution for the Negro problem was to return the Negroes to Africa. Few were prepared to act decisively against the weight of custom, and against the increasingly panicky and fearful resistance of the South, convinced as it was that its autonomy, and indeed its freedom, were threatened by the protest against slavery.

Hamilton and many other participants in the Convention believed that the Constitution would never have been made unless its several compromises on slavery were accepted, particularly the provision of article I, section 2, adapted from the tax provisions of the Articles, that three-fifths of the slaves, discreetly noticed as "all other persons" to distinguish them from "free persons," should be counted in apportioning representatives to the states. Secondly, one should mention the Sherman Compromise, giving each state two Senators, although many factors other than the problem of safeguarding slavery entered into this rule. Third, there was the fugitive slave provision of article IV, section 2, denying the principle of *Somerset's* case in the law of the United States, and finally, the first clause of article I, section 9, supported by article V, denying Congress the power to prohibit the slave trade until 1808.

¹² A convenient review of the literature, as well as a good deal of the original research, appears in STAMPP, *THE PECULIAR INSTITUTION* (1956). A classic on South American slavery (and on the social process) is FREYRE, *THE MASTERS AND THE SLAVES* (2d Eng. ed. 1946). See also FARNAM, *op. cit. supra* note 11, at 167-79; FRANKLIN, *FROM SLAVERY TO FREEDOM* (1947).

"Without this indulgence," Hamilton concluded, "no Union could possibly have been formed."¹³

The fugitive slave section of article IV was an increased source of tension as the nation lurched towards civil war. It provided that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on Claim of the Party to whom such service or labor may be due."

This provision — not notably ambiguous as constitutional sentences go — defines one dimension of the constitutional and political conflict which led to the Civil War.

If every Northern state had to yield up fugitive slaves to their masters, could those states abolish slavery in fact? Could they enfranchise Negroes? Could free Negroes living in the North go into slave states, and claim there the privilege and immunities of United States citizenship? Was the Northwest Ordinance valid in banning slavery in that territory? Were the great Whig compromises of 1820 and 1850 valid, in the face of this ominous provision? By the same token, could the Congress abolish slavery in the territories? Could a state enslave a free Negro if it could catch him?

In that period, many Southerners strongly defended the Constitution as a national limitation on the authority of the states. Some of the abolitionists were among the strongest advocates of secession.

The Compromise of 1820, which kept the balance between North and South in the Senate, adjourned the issue of slavery for thirty years as an ultimate test of the institutions of Union. But those thirty years were an era of transformation. Industries, universities, cities, and provinces sprang up. Jackson was one symbol of the change, Melville, Thoreau, Hawthorne, and Emerson were others. Especially after 1830, it was one of those times when a mysterious conjuncture of forces precipitates a change in the moral climate. In every country of the world, suddenly, and without much warning, men of all political temperaments, conservative and liberal, began to agitate for social action against cruelties and injustices long ignored. The forces of humanitarianism touched every phase of social experience. There were poor laws and factory laws, concern about child labor and the rights of women, prison reform, agitation to prevent cruelty to animals, a radical enlargement of the right to vote. And above all, a worldwide movement, led by Wilberforce in England, fought to end slavery.

The antislavery movement was hardly one of mass sentiment, at least in the United States.¹⁴ The Antislavery Society, and the various other branches and sects of the movement, were led by a tiny dedicated élite. At most, the abolitionist movement, even in New England, did not become more than a small, despised band of prophets until well after the beginning of the Civil War. Their support was a political liability even in the election of 1860.

¹³ FARNAM, *op. cit. supra* note 11, at 125.

¹⁴ See LLOYD, *THE SLAVERY CONTROVERSY — 1831-1860* (1939); MCPHERSON, *THE STRUGGLE FOR EQUALITY* (1964).

Yet their work offers a fascinating opportunity to observe the functions of leadership in the formation of opinion, and in the preparations for political action. The abolitionists had friends of influence, and leaders who were heard, even if they were scorned and mobbed. For a long time, they challenged the conscience of the nation, and posed the issues which were seen later, when the crisis came, to offer alternative courses.

The rising vehemence of the abolitionist outcry deepened the sense of fear in the South, as the country expanded to the west, and the even balance of North and South in Congress became more and more manifestly a chimera for the future. The controversies over the admission of new states were colored by panic, which was in turn heightened by the lightning flash of John Brown's raids.

In this setting, we see *Dred Scott* as a final attempt to restore the old balance and order to a political system in crisis. One of the main structural elements of the Union, as it had hitherto existed, was disintegrating. The nation had to be rebuilt on a new footing. Could that task be accomplished in peace?

It is of absorbing interest to reexamine *Dred Scott* as part of this process. Every schoolboy knows it was Taney's great mistake, a dreadful act of judicial usurpation, a self-inflicted wound which is supposed to have weakened the Court for a long time — although the Court issued one of its most powerful and confident decisions, *Ex Parte Milligan*,¹⁵ less than ten years later. Having recited these clichés, we generally fail to read the opinions in the case, and turn to the next chapter.

Dred Scott repays a modern reading, both as a political effort that failed, and as an exposition of the concept of national citizenship, the indispensable basis for contemporary civil rights legislation. The reasoning of *Dred Scott* hardly supports the stereotype image of Taney as a defender of slavery and states' rights. Its flaw was more fundamental than the errors of law and the miscalculations of politics on which it rests. In *Dred Scott*, Taney committed the truly fatal error for judges, that of insight and intuition. He failed where Mansfield succeeded so magnificently in *Somerset*, that is, in perceiving the true condition of public opinion, even though it was inchoate and perhaps unconscious before he spoke, and, therefore, the possible scope of judicial leadership. In *Somerset*, Mansfield framed the issue for decision by stating a premise so majestic, and seemingly so self-evident, that no one noticed its revolutionary character: Slavery, he said, is "so odious that nothing can be suffered to support it, but positive law." Once this sentence was put at the top of the page, the result in the case was assured. There were no statutes with which the slave owner could overcome the presumptions Mansfield put in his path. And Mansfield swept away earlier judicial decisions of contrary import.

But Mansfield's premise was by no means self-evident. As Lord Stowell tartly observed, "ancient custom is generally acknowledged as a just foundation of all law." With some bewilderment, however, Stowell recognized the binding quality of Mansfield's achievement, in holding that the owners of slaves had

¹⁵ 71 U.S. (4 Wall.) 2 (1867).

no authority or control over them in England, nor any power of sending them back to the colonies in chains.

Thus fell, after only two-and-twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained without exception ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation and by the public establishment of its Government, and it fell without any apparent opposition on the part of the public. The suddenness of this conversion almost puts one in mind of what is mentioned by an eminent author, on a very different occasion, in the Roman History, "*Ad primum nuntium cladis Pompeianae populus Romanus repente factus est alius*": the people of Rome suddenly became quite another people.¹⁶

It is easy to understand Taney's mistake in *Dred Scott*. He was eighty years old, and had just lost his wife and daughter under harrowing circumstances. Reasonable, sober men, devoted to the Union, hoped for a new and sagacious compromise, like that of 1820, which could conciliate North and South and allow slavery to fade away gradually, as villainage had faded in England. In the troubled decade of the 1850's, the appeal of *Dred Scott*'s desperate remedy is apparent. Most moderate opinion hoped the Supreme Court would issue a Solomonic judgment that could achieve magical results. The unthinkable alternative of war distorted judgment. The old Federalist and Jacksonian Chief Justice from Maryland, Catholic, pacific, and devoted to the nation, sought to restore the rule that had harmoniously corresponded to public feeling in 1789 and 1820 — the premise of the Negro as a person apart in our law. His intuition failed him. He did not perceive that the social and moral basis for the rule had vanished, so that the rule itself, and all its corollaries, had become obsolete. And above all, he failed to divine, as Mansfield had in *Somerset*, a clarifying hypothesis buried in the integuments of the future, and waiting to be born.

Perhaps there was no such rule. It is generally thought that the conflict was beyond reach of the courts. Surely no solution was conceivable without nullifying at least the fugitive slave provision of the Constitution, which had in all probability been addressed to the decision in *Somerset* in the first place. Within a few years, Taney took a long step in that direction, in holding that the duty of a state under article IV, section 2 of the Constitution to deliver up a fugitive from justice, while mandatory, was political, and could not be enforced by the courts.¹⁷ But even if that approach would have been adequate, it came too late.

The opinion in *Dred Scott*, which after a time became a target for abolitionist speakers, dissolved under the pressure of events, adding to the anxieties of the time. It threw doubt on the Whig compromises of 1820 and 1850, and made the equilibrium of Congress hopelessly unstable. The parties were split into

¹⁶ *The King v. Allen*, 2 Hagg. 94, 106, 166 Eng. Rep. 179, 183 (Adm. 1827). See also *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654, 660-61 (1872); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407-27, 534-36, 590-600, 624-27 (1857).

¹⁷ *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

fragments, as the debate between Douglas and Lincoln was reenacted in every village and town.

The election of 1860 mirrored the confusion of the public mind. The Republican nominee was moderate and ambiguous on the Negro question, against slavery and against abolition as well. While some of his supporters — Seward and Andrew, notably — were strongly abolitionist, abolition was avoided in the campaign as warmongering would be avoided today. The abolitionist sentiment as such was weak: Lincoln carried New York by 50,000, but a constitutional amendment easing Negro suffrage lost 2 to 1.¹⁸ Nonetheless, Lincoln represented “an anti-slavery idea,” as Wendell Phillips said, and the country understood it.¹⁹

The firing on Fort Sumter released reservoirs of passion no one knew were there. The mystical notion of the Constitution as an indissoluble union of people, not states, proved its transcendence. For the longest, bloodiest years of war of the century, the people testified to their faith in this instinct of union. As the war progressed, the slavery issue became as vital to the war effort as the idea of union itself. Despite the resistance and hesitations of the politicians, and the strong racial prejudices of the people of the North, the atmosphere toward abolition changed. The abolitionists' meetings were larger and more fashionable. The Republican Party openly sought their help both in 1862 and in 1864. In *Dred Scott*, one of Taney's most telling arguments to show that Negroes were not regarded as part of the sovereign constituent mass of “the people of the United States” in 1789 — “the political community formed and brought into existence by the Constitution of the United States”²⁰ — was that they were often disqualified for military service by the laws of the states.²¹ Hence a strenuous effort was made, over bitter resistance, to form Negro regiments and to send them to the front.²² For the simplest and most direct of reasons, the Republican Party began to press the cause of enfranchising the Negro, North and South.²³

The impulse for reform, so unwillingly and almost absent-mindedly kindled by the circumstances of the war, flickered out after eleven postwar years of violent controversy. Three great amendments were passed, and many changes in the position of the Negro began to take place. The abolitionist society was disbanded and split up on the ground that its primary goal, the abolition of slavery, had been accomplished. Legislation to provide land and special forms of education for the freed Negro failed of passage. These two causes, fundamental to the realization of equality for the Negro, were left to weak pilot projects financed and staffed by private groups. The earnest efforts of philanthropy were commendable, and accomplished much. But they were not an

¹⁸ MCPHERSON, *op. cit. supra* note 14, at 25.

¹⁹ *Id.* at 27.

²⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857).

²¹ *Id.* at 415. His other argument at this level, equally symbolic, was the mass of laws of the period against marriage between members of different races. *Id.* at 408-16.

²² MCPHERSON, *op. cit. supra* note 14, 192-220; MCPHERSON, *THE NEGRO'S CIVIL WAR*, 143-244 (1965).

²³ WOODWARD, *REUNION AND REACTION* 94-95 (1951).

equivalent in any way of massive governmental action commensurate in scale with the magnitude of the problem.

Meanwhile, political resistance to reform grew in strength. By 1877, the nation had become tired of occupying the South, and tired of the turbulence to which the struggle for Negro rights seemed to lead. A movement symbolized by the Ku Klux Klan, and in many places led by it, had helped to mobilize Southern support for massive resistance to national authority. Those in the South who held other views were intimidated or discouraged. Many left the South altogether.

President Grant's Administration did not undertake to enforce the Civil Rights Acts or the Force Act with any vigor. The Freedmen's Bureau was abolished. The so-called "Radicals" no longer controlled the Republican Party. Their place was taken, more and more openly, by men of the old Whig spirit, who wished to reach an accommodation with the "propertied classes" of the South, and terminate the era of violence and instability which prevailed in many parts of the South.

The contest over the outcome of the Hayes-Tilden election of 1876 gave men of this persuasion their opportunity. Apparently won by the Democratic candidate, a Governor of New York, the election was so close, and the returns from many states so open to objection, that the result was in doubt until the moment before Inauguration Day, and the country witnessed ominous preparations for the renewal of armed conflict. The Compromise of 1877 which led to the inauguration of President Hayes still has aspects of mystery, despite Professor Woodward's magisterial and authoritative study of the subject.²⁴

What is certain about the atmosphere of the Compromise, however, is that it involved, on one side, an acceptance of the Republican candidate for the Presidency, and the consolidation of a powerful Republican Party, based not on abolitionist New England, and on Negro votes in the South, but on the agrarian and conservative Middle West and Northwest, where the Copperhead sentiment still flourished. Thus a tacit coalition emerged between Southern Democrats and some Northern Republicans as the normal ruling force in our politics — the ultimate power bloc to which authority always tended to return. On the other side, the Compromise implied an end of military occupation and of Reconstruction government in the South. Its hidden premise was the restoration of white rule in the South, and the disenfranchisement of the Negro. The nation walked by on the other side as riot, massacre, boycott and lynching were used to deprive the Southern Negro of his vote and degrade him anew to the caste of helot.²⁵

We allowed violence to nullify the Constitution, and condoned a political order based on disobedience to law. The North yielded to mob action and to Southern resistance in the Confederate spirit, based on mob action. The South abandoned its effort to expand to the west. But it clung to white supremacy

²⁴ *Ibid.* See generally BUCK, *THE ROAD TO REUNION — 1865-1900* (1937); STAMPF, *THE ERA OF RECONSTRUCTION — 1865-1877* (1965).

²⁵ See, e.g., MAGRATH, *MORRISON R. WAITE* 154-71 (1963).

in the South itself. A virtual moratorium on the enforcement of the fourteenth and fifteenth amendment emerged, at least as to Negro rights in the South.

Troubled men, North and South, said that "after all, the Negro was not yet ready" for equal citizenship. They comforted themselves with the thought that the disenfranchisement of the Negro, and the coming to power of Jim Crow, were transitory phenomena, measuring no more than necessary delays in the fulfillment of the promise of fourteenth and fifteenth amendments. Passion and custom were too strong at the moment for the enforcement of the law, they concluded. But the education and social advance of the Negro, and the ultimate egalitarianism of the American people, would "gradually" prevail. Such, at least, was their hope.

After 1877, the political life of the country turned away from the Negro problem, and the reforming spirit was absorbed in private efforts to help the Negro through education and social development. The Force Act was repealed; the Supreme Court, reflecting the spirit of the Gilded Age, declared parts of the Civil Rights Act to be unconstitutional ²⁶ and later upheld the constitutionality of segregation.²⁷ The Government in Washington treated the undeniably constitutional chapters of the Civil Rights Acts — most particularly those dealing with the selection of jurors and with voting — as dead letters. The nonenforcement of the fourteenth and fifteenth amendments became a basic element in the foundation of the political system, and a basic, if guilty, expectation of the white South.

But the Coalition of 1877 did not rule unchallenged, even in the period before 1914. The industrial and financial revolution of the late nineteenth century and early twentieth century stimulated its counter-thesis. The oligarchs and titans of the great new companies aroused fear as well as envy. Small-town independent business and regional leaders rallied against the specter of complete economic control from New York. Agrarian protest swelled, and found effective political expression in the Granger movement and in Populism. Trade unions were formed, often led by Socialists linked to the various Socialist movements of Europe. Journalists and other writers stirred an outcry against the concentration and abuse of economic and political power. And many of our best spirits devoted themselves to protest against the materialism and vulgarity they found to be rampant in American life. Recurring economic depressions invariably fortified the chorus of protest, and strengthened political groups concerned with the grievances behind such protests.

Inevitably and invariably, justice for the Negro emerged as an object of all our progressive movements, although not until recently as one of their major goals. Some of the radical Progressive leaders were anti-Negro, antiforeign, anti-Catholic, and anti-Semitic. But they were exceptional. The spirit of social advance which they expressed and embraced could not resist the rightness of the Negro's claim.

²⁶ Civil Rights Cases, 109 U.S. 3 (1883).

²⁷ Plessy v. Ferguson, 163 U.S. 537 (1896).

Meanwhile, year by year, the industrial revolution drew people from farms to factories, and from rural areas to the growing cities. More and more Negroes joined in the migration. A slowly rising fraction of the Negro population, armed with high school or college diplomas, undertook middle-class vocations and middle-class patterns of life.

The accident of Theodore Roosevelt's unsatisfied ambition played a significant part in the political history of the Negro's cause, as it did in the political history of the Republic. The Republican Party never fully recovered from the Bull Moose campaign of 1912, which was followed by the Progressive Party effort led by Senators LaFollette and Wheeler in 1924. During his first term, President Franklin Roosevelt was able to speed up the exodus from the Republican Party his Republican cousin had begun twenty years before. Senator Norris and many other Progressive Republicans became Roosevelt Democrats during the early thirties, and then simply Democrats who supported Presidents Truman, Kennedy and Johnson, and backed Aldai Stevenson as a candidate in 1952 and 1956. Attracted by the welfare programs and the liberal spirit of the New Deal and the Fair Deal, the growing mass of Negro voters in the North and the scattered Negro voters of some Southern cities were notable among the Bull Moose pilgrims who left the Republican Party. The Negro voter became one of the pillars of the Democratic Party, with Labor and the urban interest generally, as that party reoriented itself imaginatively to the pattern of underlying change in American society.

III.

These political events did not occur in a vacuum. The nation grew and was industrialized. It suffered the pangs of Manifest Destiny, and became a participant in world affairs, with commitments in the Caribbean and the Pacific, and a growing sensitivity to the balance of power in Europe. It undertook the regulation of railroads and other national utilities, an antitrust policy, and national policies toward agriculture, labor and banking. The elections reflected the changing concerns, and the changing needs, of a small, isolated, homogeneous, agricultural, rural nation which was rapidly becoming a vast, urban, cosmopolitan, industrial leader in world politics.

The first economic need of the men who tamed the continent has always been manpower — an insatiable and imperious demand which led us to indentured servitude and then to slavery, and later to immigration on a massive scale. The perennial shortage of labor in the American economy has been the source of some of our most difficult social problems — that of the Negro, manifestly; those of the melting pot in our great cities; and later, the resistance to immigration, and the nostalgic desire to restore the Anglo-Saxon or Nordic atmosphere of an earlier America, represented by the Oriental Exclusion Acts, and by the Immigration Act of 1924. That statute, passed under trade union pressure, drastically reduced the flow of immigrants which had made economic growth possible between 1880 and the mid-twenties.

In the course of this far-reaching transformation, the Negro ceased to be the ignorant and forlorn Freedman of the 1870's and 1880's, and became more and

more visibly a member of the urban melting pot. A large fraction of the Negro population remained in the South as agricultural workers, at least until the decline of cotton in the 1930's, and the industrial migrations of the Second World War. But the advance guard of Negro immigrants in the cities of the North began to endure the trials and strains of assimilation as early as the turn of the century, and a significant number of them emerged with success.

The Negro, of course, faced special hazards in the melting pot, and he faces special hazards still. Like other immigrants reared in primitive agricultural villages, the Southern farmhand in a big Northern city, be he white or Negro, suffers the handicap of not being familiar with the skills and habits of modern urban life. The Negro rarely comes into the melting pot as a toolmaker, or mechanic, or welder, or even as a carpenter or plumber, because tight restrictions on apprenticeship have for generations excluded him from training in the basic trades of advanced technology. Sometimes not even the menial or the Hunky jobs are open to him. The curse of slavery has been a terrible burden, both for white men and for Negroes, and it has been felt, and is felt today, in all our arrangements for living, working, and schooling.

Despite our pervasive heritage of racial tension, however, the melting pot worked for the Negro as it did for the white immigrant — not so quickly, perhaps, as in the case of some white groups, particularly well prepared for urban life, but quite as rapidly, in all probability, as the average. In our frustration at the slowness and difficulty of the process of assimilation, we often forget that the Negro immigrant to the North is by far the most recent of our mass immigrants. In many cities of the North, the Negro population has risen from 5 per cent to 20 per cent during the last twenty years, almost entirely as a result of migration from the rural South. This vast movement has taken place at a time when other immigration has been largely confined to middle-class or near-middle-class refugees, or to the relatives of citizens, enjoying special advantages on the ladder. We have forgotten what the immigration of the late nineteenth century was like, with its "huddled masses" of the poor and ignorant, its alien atmosphere, and its often disorderly circumstances. Large-scale white immigration came to an end before World War I, and was never resumed in the same way again.

As soon as they were able to do so, the successful early Negro migrants in the North began campaigns to protect the rights of Negroes, and to improve their position. These voluntary societies, many of which trace their lineage back to the abolitionist and Negro welfare groups of the nineteenth century, have been indispensable factors in organizing and directing the campaigns which prepared the way for the Civil Rights Revolution of the postwar period and particularly for decisive national action in 1964 and 1965. These groups have worked in many areas, and at many levels. Some have pursued quiet programs of persuasion in individual communities, arranging with those in authority to have private or public barriers to equality removed. Others have functioned in the realm of opinion, and the political realm, seeking support for the idea of progress.

In retrospect, the most important and effective of these groups — the organ whose achievement made that of all the others possible — was the Legal Defense and Education Fund of the National Association for the Advancement of Colored People. That organization conceived and applied the bold and simple idea of appealing to the law to enforce the law. Their original plans were by no means a systematic blueprint for the campaign which emerged, case by case, from the process of their experience. But the germ was there, based on the realization that the ultimate moving power in American society is the body of ideals expressed in the Declaration of Independence and the Constitution, and enforced by the courts as law. All the rest followed — the prodding, restless demonstrations on the streets, the meetings, the marches, the sit-ins and the petitions. For the purpose of the protests was to stir a nation to live by its own creed, and to obey its own law, even when the law required, and imposed, a political and social revolution.

To realize why their program of change through law accomplished so much, and how it aroused the nation to respond, we must go back to the 1880's again, and recall the way the law developed.

IV.

While the inauguration of President Hayes began a period of self-deception and discreet silence on the problem of Negro rights, the Supreme Court did not openly suspend all attempts to apply and interpret the fourteenth and fifteenth amendments.

In the *Civil Rights Cases* of 1883, to be sure, the Court accepted and ratified the political compromise of 1877. Over the dissent of Justice Harlan, it held the public accommodations sections of the Civil Rights Acts to be unconstitutional, on the ground that while the fourteenth amendment was a prohibition only against action by the states, the federal statute should be considered to deal with private actions, not actions by the states, in the absence of a legislative finding that in some states segregation of the races in places of public accommodation was required either by state law, or by "custom having the force of law."²⁸ While the Court thus carefully preserved the possibility that Congress and the Executive might try again, the political equilibrium on the subject was not favorable to such an attempt, and the moratorium on the enforcement of the amendments in the South, as we have noted, became one of the structural elements in American politics.

But the Supreme Court did not treat the fourteenth amendment as suspended in this crucial period. On the contrary, for two generations, it was one of the most fashionable provisions of the Constitution, being invoked repeatedly as the basis for striking down state laws regulating business. And, starting before the turn of the century, the "due process" clause of the fourteenth amendment, and the "equal protection" clause as well, began to be applied as tests for the legality of criminal trials in the state courts, including trials clouded by force and the threat of force. Somewhat later, the amendment was also in-

²⁸ *Civil Rights Cases*, 109 U.S. 3, 14, 16 (1883).

voked in another important line of cases, to protect freedom of speech and of the press, freedom of religion, and other personal and political rights.

Before 1930, then, the Supreme Court had established two positions of central importance to the Civil Rights Revolution of the last twenty years — first, it had made the Constitution, and the process of constitutional adjudication, a far more active and continuous force in American public life than had ever been the case before, and it had won general acceptance for its role as the active protector of constitutional rights; and secondly, it built a corpus of precedents from which the modern law of personal liberty emerged naturally, and with the invaluable sanction of past authority.

The true turning point in the recent history of the Court is the Chief Justiceship of Charles Evans Hughes. The moral temper of the country was changing, under the impact of the Great Depression, and the experience of war and the threat of war. The law reflected that change, and played a considerable part in bringing it about. Each decision applying a principle of constitutional order opened a debate in the legislatures, the press, and the classrooms of the nation — a debate which often reached the country stores and the political campaigns as well. And each case suggested new possibilities to lawyers, and, therefore, tended to invite further tests of principle through further litigation.

During the 1930's, the constitutional law of personal and civil rights began to grow. The Supreme Court dealt with a surprising number of problems, from freedom of speech and of religion to martial law, the right to vote, and the concept of due process in the criminal trial. And, in case after warning case, it began to enforce the fourteenth amendment to protect Negroes against discrimination. The justices seemed to be alerting the nation to the fact that the old moratorium of 1877 was crumbling away, and would not long endure.

The civil liberties and Negro organizations responded to the Court's lead and began to bring cases far more frequently than ever before. And, in the normal manner of a common law court, the Supreme Court dealt with the questions brought before it, sometimes upholding, and sometimes denying the claim of right.

Thus, the social and political experiences that altered the moral climate of the country also altered the law. In turn, the decisions and opinions of the courts, and notably those of the Supreme Court, exerted a powerful and far-reaching influence on the national mind. The renewed protection of Negro rights in the courts during the 1930's emerged as an integral part of a wider development — a fresh, confident assertion of the spirit of liberty and equality in many realms and at many levels of American life: in Washington and in the states, in the universities and in the churches, in business, in law, in politics and in social life. It was one of those remarkable moments when the impulse for improvement was strong and made itself universally felt. The progressive feeling naturally embraced the question of Negro rights.

V.

These, then, were the main forces behind the breakthrough in Negro rights represented in part by the Civil Rights Act of 1964 and the Voting Rights Act

of 1965. Changes in the outlook and experience of our people, shaped and brought into focus as changes in law, have forced the nation at last to realize that we have tolerated hypocrisy or worse in the surviving resistance to the fourteenth and fifteenth amendments, and in the political arrangements based on the Compromise of 1877.

The intensity of the yearning for progress was greatly heightened by World War II, and by the strains and pressures of the period of Cold War. So far as the rights of the Negro are concerned, it became more and more visibly absurd to require him to serve in the armed forces abroad, and then to deny him full equality as a citizen at home. Race has taken on altogether new dimensions as a political and social problem, with the end of Empire in the world, the rising importance of the colored nations of Africa and Asia, and the impact of Hitlerism on the modern mind.

While there was a pause in our politics after World War II, as there was after the Civil War and after World War I, an attempt to return to the supposed normalcy of old-fashioned conservatism, the underlying will of the country required another kind of leadership. The decisive political education of the nation had been conducted by President Roosevelt. And the outlook of the New Deal is the foundation for our modern creed of political action. It was not an accident in 1960 that the nation accepted President Kennedy's call for renewed social change — and incidentally buried in the process the ancient prejudice against equality for Catholics. Nor is it an accident that leadership has come to President Johnson, who combines qualities of John Bunyan and Paul Bunyan in seeking to fulfill in fact the social aspirations to which most Americans have long been committed by their history.

On the question of Negro rights, we have lived through what can be described as a political symphony of democracy in action.

In the first movement, the Supreme Court declared the theme with great force, and in terms which finally demanded a political response. For a generation or more, the Supreme Court had challenged the nation to make good its promise of equality to the Negro. Recognizing the changes which have occurred in society, in the status of the Negro, and in other parts of the law of the fourteenth amendment, the Court decided case after case in favor of the Negro — cases dealing with the use of public parks, the right to vote in primary elections, the right to attend state-supported law schools, colleges, and other institutions, the selection of jurors, and other issues.

The process of challenge reached its culminating point in *Brown v. Board of Educ.*,²⁹ in 1954, dealing with segregation in elementary schools. That case stirred the country as none of its predecessors had done, for it touched the daily life of all the people, and put the issue in a form which politics could no longer ignore.

Congress then declared the second movement of the symphony. Slowly, reluctantly, it considered the implications of the problem for a decade, while

²⁹ 347 U.S. 483 (1954).

the reapportionment movement began to alter the historic balance of political power within the states, and to sap the walls of old forts and citadels.

In this period, Southern resistance to the law became quite frantic. Officials avoided open contempt of court orders, but used every other device ingenious and often desperate men could think of to circumvent them. Violence against the Civil Rights petitioners was endemic, and went almost entirely unpunished, even when it was murder. The movement of civil disobedience to law, led by men who had taken oaths to uphold the Constitution, spread throughout the South, and reached into other parts of the nation as well. The United States was at last forced to recognize that it faced something approaching an insurrection, in a series of clashes with Southern officials closely analogous to the revolt of the French officers in Algeria.³⁰

Southern leaders, mindful of the lessons of 1877, made strenuous political efforts to reestablish the old bargain which had permitted them to postpone the consequences of Appomattox for almost a century. Starting in 1948, some of them sought to precipitate another electoral deadlock in which they could hope to determine the choice of a President on their own terms. And in Congress, they fought to preserve their historic alliance with leading members of the Republican Party.

Finally, after ten years of deliberation, Congress responded, and responded with overwhelming force, in the Civil Rights Act of 1964. Many factors converged to produce its fully considered action in that year — despite the fact that it was an election year, and a year when many congressmen faced disturbing hazards at the polls. There was the majestic civil rights demonstration of 1963 in Washington, and other unmistakable manifestations of deep public feeling. The zeal and force of President Johnson's leadership, and the poignant memory of President Kennedy's death, played significant parts in the timing of the event. The country came to sense the nature and gravity of the crisis — a crisis of legality itself, as well as one of justice in law. Television brought into every home the spectacle of police brutality toward peaceful civil rights demonstrators and of Southern officials and Southern mobs defying the law. There was somber realization, too, of what was implicit in the reluctance of Southern juries to convict men of crimes linked to the civil rights movement, even when their crime was murder. In the end, for most Senators and congressmen, their vote for the Civil Rights Act of 1964 was an act of conscience and of duty. They were receiving masses of hostile mail. They could not estimate the extent of the so-called white "back-lash" they faced at the elections in the fall. But they knew, too, that the Supreme Court was right in seeking to enforce the fourteenth amendment against racial discrimination. And, having seen the face of anarchy, they voted to put the full power of the federal government behind the judges' quest for lawful order.

The overwhelming vote of the Congress for the Civil Rights Acts of 1964 and 1965 in effect ratified the work of the Supreme Court in this field during the long generation since Chief Justice Hughes's appointment in 1930. And, by

³⁰ FRIEDMAN, *SOUTHERN JUSTICE* (1965); MORGAN, *A TIME TO SPEAK* (1964).

an accident of history, both the substance of the civil rights law and the historic and juridical legitimacy of the Supreme Court's conception of its role were placed squarely in issue by the Presidential campaign of 1964. The election of 1964 was, among other things, a referendum of both subjects, because the candidates took explicit and altogether different positions on them.

Thus, with a symmetry and clarity rarely found in the political life of democracy, the people themselves ratified what the Court and Congress had done. Their vote, the ultimate reservoir of sovereignty, gave renewed life to the Constitution, and a renewed mandate to the Court.

And, at long last, it interred the Compromise of 1877.

VI.

My purpose in this lecture was to consider law not as a static body of rules, but as a way of making decisions of policy — a method using certain modes of thought, and certain rules of procedure, whose goal and end is to help the actual approach the ideal posited in our minds by history and our sense of justice.

I began by recalling the position of the Negro as a degraded slave, entitled to no rights, in the famous phrase of *Dred Scott*, the white man was bound to respect. The burden of that history is not easy to escape, either for the white man or for the Negro. In quick review, we then reminded ourselves of the several chapters of the story — the rise and fall of movements of reform; the compromises engineered by the great Whigs, as the nation flowed westward and the collapse of their work in the tragedy of the Civil War; the period of reconstruction, and that of quiescence after 1877, while the nation concentrated on building industries and cities; the progressive movement, which began again to stir the nation's conscience; the wars of the twentieth century, the Depression, and now the extraordinary age in which we live — one dominated by a social revolution so pervasive and so familiar that we scarcely notice it. It is a revolution of success, and of growing success, in all the capitalist countries of the West. The capitalist nations are moving ahead far more rapidly in every respect than the Communist or underdeveloped countries, and moving ahead in terms of their own ideals. There are many reasons for the phenomenon. The most important is an increasing confidence in their ability to order their affairs in ways which permit them to fulfill their ideal of social justice.

In our country, the Supreme Court has been a major source of our concept of the ideal as the interpreter of the Constitution in a wide area of social policy. Over a generation, and with increasing insistence, the Court has appealed to the country, by reminding us that we have made promises we have not kept, and that those promises represent our highest aspirations. For the Court, this is not a usurpation of function, but a fulfillment of its peculiar and particular function as a spokesman of law. The Court has thus helped to maintain a creative tension in our minds between social actuality and our shared notion of what society ought to become. In the intellectual and moral climate of this time, the Court has proposed and the nation has accepted great strides forward

in law, strides intended to help achieve liberty and equality, and to make fraternity more nearly conceivable.

In part, the strange and disturbing history of the Negro in our law is no more than a special instance of the conflict between custom and positive law, and between the positive law at any moment and the goal for law which is the "compass" of our policy, in Lord Radcliffe's arresting phrase. In part, however, it has been something more: a clash between authority and anarchy, a crisis not of law but of legality itself. When governors and legislators and state police openly or secretly resist the plain command of law, our system of law is challenged as it has not been challenged for a century. In this clash, those like Governor Wallace who advocate and practice civil disobedience defy what Ortega y Gasset calls the *concordia* of society — the indispensable concord and agreement, the universal consensus on the fundamental procedural rules and norms of the civil order, which alone make it possible to enjoy a social life ordered by law.

The Suppression of the *Nauvoo Expositor*[†]

By Dallin H. Oaks*

The suppression of the *Nauvoo Expositor* by the Mormons in Nauvoo, Illinois, in 1844 has interest for historians because it was the first in a series of events that lead directly to the murder of the Mormon prophet, Joseph Smith.¹ The effect of the suppression of this anti-Mormon newspaper on the non-Mormon elements in the vicinity was explosive. In the neighboring cities of Warsaw and Carthage citizens in mass meetings declared the act revolutionary and tyrannical in tendency and resolved to hold themselves ready to cooperate with their fellow citizens in Missouri and Iowa "to exterminate, utterly exterminate the wicked and abominable Mormon leaders" and to wage "a war of extermination . . . to the entire destruction, if necessary for our protection, of his adherents."² Thomas Ford, then Governor of Illinois, called the event a violation of the Constitution and "a very gross outrage upon the laws and the liberties of the people."³ Even B. H. Roberts, a Mormon historian, conceded that "the procedure of the city council . . . was irregular; and the attempt at legal justification is not convincing . . ."⁴ Roberts placed his defense of the action "on the grounds of expediency or necessity."⁵

This article will examine the legal basis of some of the charges the *Expositor* made against the leading citizens of Nauvoo and the legal implications of the suppression of the newspaper by those citizens. Before this is done, however, it will be helpful to review some facts that put the event in historical perspective.

I. HISTORICAL BACKGROUND

After successively fleeing or being driven from their homes and property in Lake County (Ohio), Jackson County (Missouri), and Clay, Davies, and Caldwell counties (Missouri), the Mormon people gathered along the Illinois bank of the Mississippi River about forty miles north of Quincy. There, in the winter of 1839, they commenced to build the city of Nauvoo. Under the leader-

[†] The valuable suggestions and criticisms of Marvin S. Hill, Assistant Professor of History, East Carolina College, on earlier drafts of this paper, and the capable research assistance of Thomas E. Cahill, Kenneth G. Johnson, and David L. Paulsen, students at the University of Chicago Law School (now members of the Wyoming, Illinois, and Utah Bars, respectively), are gratefully acknowledged.

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¹ For other treatments of some of the historical material discussed here, see H. SMITH, *THE DAY THEY MARTYRED THE PROPHET* (1963); Gayler, *The "Expositor" Affair — Prelude to the Downfall of Joseph Smith*, 25 Northwest Missouri State College Studies, Feb. 1, 1961, p. 3. An interesting contemporary account of these events, written by a non-Mormon resident of Hancock County, is a Letter From H. H. Bliss to Franklin Bliss, June 1844, on file, Indiana University Library, Bloomington, Indiana.

² 6 J. SMITH, *HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 464 (2d ed. 1950) [hereinafter cited as SMITH].

³ *Id.* at 534.

⁴ 2 ROBERTS, *A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 231-32 (1930).

⁵ Roberts, *Introduction* to 6 SMITH at xxxviii.

ship of their prophet and president, Joseph Smith, they obtained a generous city charter, erected substantial homes and public buildings, obtained a charter for a university, and initiated trading and some manufacturing.

By 1844 Nauvoo was the largest and one of the most prosperous cities in Illinois. But events already in progress were soon to prove its downfall. Some citizens were jealous of Nauvoo's prosperity, others were hostile to the curious religion of a majority of its inhabitants, and many were suspicious of the political power of its leaders.⁶ Each of these sore spots was aggravated by events in the first six months of 1844. At this time Joseph Smith was mayor of the city of Nauvoo, ex officio chief justice of the municipal court, and lieutenant general of the Nauvoo Legion, a large body of state militia organized pursuant to the Nauvoo City Charter. Prominent church officers and members filled most of the other positions of leadership in the city and legion.⁷

Antipathy toward the union of religious, civil, and military authority in Nauvoo was sharpened by Hyrum Smith's candidacy for the legislature from Hancock County and by Joseph Smith's announced candidacy for President of the United States. The Smiths' candidacies gave the Mormons men they could support in preference to the alienated Whigs and Democrats, but they also put the two major parties on notice that neither could hope to win the decisive Mormon vote, thus removing any moderating influence either party might previously have exerted.

The enmities engendered by political controversies and local commercial rivalries between saint and gentile were magnified by religious and personal animosities. The religious turmoil was given a sensational focus in 1843-1844 by several new doctrines that the prophet was reportedly introducing, especially polygamy. Personal hostilities were magnified by the excommunication from the Church of several prominent religious and community leaders, including William Law, one of Joseph Smith's counselors, Wilson Law, a general in the Nauvoo Legion, and Francis M. Higbee. In the troubled spring of 1844 these men and their associates proceeded to organize their own church and then joined with the anti-Mormon elements of Hancock County in efforts to humble Nauvoo and bring about the downfall of Joseph Smith.

Historians are fond of characterizing these conditions as combustible materials awaiting only a spark to set them aflame to work death and destruction.⁸

⁶ BERRY, *The Mormon Settlement in Illinois*, in *TRANSACTIONS OF THE ILLINOIS STATE HISTORICAL SOCIETY FOR THE YEAR 1906*, at 88 (1906), and Gayler, *The Mormons and Politics in Illinois: 1839-1844*, 49 *ILL. STATE HISTORICAL SOC'Y J.* 48 (1956). Both authors argue that the Illinois citizens' hate and distrust of the Mormons were due more to the Mormons' actions in local and national politics than to their economic position or religious views.

⁷ Mormon domination of local government and militia undoubtedly stemmed from the bitter Missouri experience, where the Mormon expulsion had been directed by hostile government officials and effected by the state militia. The presence of the well-trained and disciplined Nauvoo Legion served as a substantial deterrent — and irritant — to the anti-Mormon citizens of Hancock County and to the Missouri elements, who were rumored to be planning an armed invasion of Nauvoo and who had already abducted various Nauvoo citizens and attempted to kidnap Joseph Smith. 6 SMITH 98-154, 5 *id.* at 430-75.

⁸ *E.g.*, NIBLEY, *JOSEPH SMITH THE PROPHET* 518 (1946); Roberts, *Introduction* to 6 SMITH at xxxvii.

The spark came in the wrecking of the *Nauvoo Expositor*, a newspaper established in Nauvoo by anti-Mormons and suppressed by the city authorities on June 10, 1844, three days after its first issue. Francis M. Higbee, one of the newspaper's proprietors, promptly made a complaint before a justice of the peace in Carthage, the Hancock County seat, against Joseph Smith, the city council, and other leading citizens for committing a riot while destroying the *Expositor* press.⁹ The Carthage justice issued a "writ" (arrest warrant) ordering state officers to "bring them before me or some other justice of the peace" to answer the charges.¹⁰

When Joseph Smith and his associates were arrested on this warrant on June 12 in Nauvoo, he proposed to go before any justice of the peace in Nauvoo, but the constable insisted on what seems to have been his legal right to take the prisoners before the issuing justice in Carthage.¹¹ Joseph Smith thereupon obtained a writ of habeas corpus¹² from the municipal court of Nauvoo, which held a hearing on the case later that day.¹³ Exercising the broadest range of habeas corpus jurisdiction authorized by Illinois law,¹⁴ the municipal court held what amounted to a preliminary hearing on the guilt or innocence of the prisoner. After hearing testimony on this question the court decided that Joseph Smith had acted under proper authority in destroying the *Expositor*, that his orders were executed without noise or tumult, that the proceeding resulting in his arrest was a malicious prosecution by Francis M. Higbee, that Higbee should, therefore, pay the costs of the suit, and that Joseph Smith should be honorably discharged from the accusations and from arrest.¹⁵ On the following morning Joseph Smith took his seat as chief justice of the municipal court, and the court proceeded to consider the habeas corpus petitions of Joseph's codefendants on the riot charges. After hearing testimony, the court ordered that these defendants also be honorably discharged, and that

⁹ 6 SMITH 453. The Illinois statute then in effect provided:

If two or more persons actually do an unlawful act with force or violence against the person or property of another, with or without a common cause of quarrel, or even do a lawful act, in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot, and on conviction, shall severally be fined not exceeding two hundred dollars, or imprisoned not exceeding six months.

Ill. Rev. Stat. § 117, at 197 (1833).

¹⁰ 6 SMITH 453.

¹¹ The Illinois statutes on this subject provided that the warrant should direct the officer to bring the prisoner "before the officer issuing said warrant, or in case of his absence, before any other judge or justice of the peace," Ill. Rev. Stat. § 3, at 220 (1833), or "before the judge or justice of the peace who issued the warrant, or before some other justice of the peace of the same county." Ill. Rev. Stat. § 7, at 222 (1833). Under these provisions, and under the language of the warrant itself, text accompanying note 10 *supra*, the constable would have had authority to take the prisoners before a justice of the peace in Nauvoo. But he was not compelled to do so, and returning them to the Carthage justice was probably the normal practice.

¹² Habeas corpus is defined and discussed in text accompanying note 106 *infra*.

¹³ 6 SMITH 454-56.

¹⁴ The question of the proper scope of inquiry under habeas corpus is discussed in text following note 125 *infra*.

¹⁵ 6 SMITH 456-58.

Francis M. Higbee pay the costs. Thereupon, execution was issued against Higbee for the amount.¹⁶

To the non-Mormons of Hancock County these actions of the municipal court, which were of questionable legality if interpreted to have the significance that the Nauvoo authorities assigned to them,¹⁷ added the insult of defiance to the injury of riot and gave substantial impetus to the furious citizens' groups who met in nearby Warsaw and Carthage and called for "extermination."¹⁸

As the week progressed, the magnitude of the crisis became increasingly apparent. In a letter dated June 16, Joseph Smith advised Governor Ford of sworn information he had received that an attempt was going to be made to exterminate the Mormons by force of arms.¹⁹ He also placed the Nauvoo Legion at the Governor's service to quell the insurrection and asked the Governor to come to Nauvoo to investigate the situation in person. On June 18, before any reply had been received from Ford, Joseph Smith declared the city of Nauvoo under martial law in view of the reports of mobs organizing to plunder and destroy the city.²⁰

Perhaps because of the rising tide of resentment against the Mormon leaders, and perhaps because of some doubts about the legality of the municipal court's action on the riot charges, the Nauvoo authorities consulted the state circuit judge, Jesse B. Thomas. He advised them that in order to satisfy the people they should be retried before another magistrate who was not a member of their Church.²¹ This advice clearly explains the fact that on Monday, June 17, a citizen named W. G. Ware signed a complaint for riot in the destruction of the *Expositor* against Joseph Smith and the other parties named in the Higbee complaint. Daniel H. Wells, a non-Mormon justice of the peace residing near Nauvoo, thereupon had the defendants arrested and brought before

¹⁶ *Id.* at 461.

¹⁷ Joseph Smith apparently thought that the hearing before the municipal court was a final acquittal on the merits of the riot charge, since he later argued that a second trial would deprive him of his right not to be put in jeopardy twice for the same offense. Text following note 25 *infra*; 6 SMITH 498, 582. On habeas corpus, however, a court could inquire into guilt or innocence only for the limited purpose of determining whether there was probable cause for the arrest. See text following note 125 *infra*.

More importantly, the municipal court of Nauvoo had no criminal jurisdiction. The aldermen who composed the municipal court were commissioned individually as justices of the peace, Ill. Laws 1840, § 16, at 55, but justices of the peace only had authority to hold criminal trials in cases involving assault, assault and battery, and affrays. Ill. Rev. Stat. § 1, at 402 (1833). Consequently, in a case involving a charge of riot, the aldermen (individually or as a body) could hold what amounted to a preliminary examination — and in their joint capacity as the municipal court of Nauvoo they could issue a writ of habeas corpus and discharge a prisoner from the custody of the arrest warrant if there was no probable cause for his arrest; but they could not finally determine a riot case by a judgment of acquittal.

It is clear, in any event, that the municipal court had no authority to impose liability for costs and to issue execution against Francis Higbee in a proceeding where he had no notice and opportunity to be heard. And it is also clear that it was highly inadvisable, if not illegal, for Joseph Smith to sit as a judge in the trial of his codefendants.

¹⁸ 6 SMITH 463–65.

¹⁹ *Id.* at 480.

²⁰ *Id.* at 497.

²¹ *Id.* at 498, 582.

him for trial.²² After hearing numerous witnesses and counsel for both prosecution and defense, Wells gave the prisoners a judgment of acquittal.²³

This second trial seems to have been no more satisfactory to the anti-Mormons than the first. During the remainder of the week there were reports of mobs forming around Nauvoo and charges of violence on each side. The Nauvoo Legion began entrenching the city against attack.²⁴ On Saturday, June 22, Governor Ford, who had come to Carthage because of the crisis, sent a rider to Joseph Smith with a letter declaring that nothing short of trial before the same justice by whom the original writ was issued would "vindicate the dignity of violated law and allay the just excitement of the people."²⁵ Joseph Smith's reply reminded the Governor that the defendants had already been tried and acquitted by a justice of the peace for the riot offense, so that a second trial would rob them of their constitutional right not to be twice put in jeopardy of life and limb for the same offense.²⁶ He also expressed willingness to stand another trial, but reluctance to rely on the Governor's promised protection because he felt that the Governor could not control the mob and because additional writs were reportedly issued against the defendants that could be used to drag them from place to place "till some bloodthirsty villain could find his opportunity to shoot us."²⁷ Subsequent events proved these fears prophetic.

On Sunday, June 23, a posse sent by the Governor arrived in Nauvoo to arrest the prophet, but was unable to find him. He had crossed the river to Montrose, Iowa, during the night, contemplating a flight to the West.²⁸ He returned to Nauvoo that evening, however, and sent the Governor a message offering to give himself up on the following day in reliance on the Governor's pledge of protection.²⁹

On Tuesday morning, June 25, in Carthage, Illinois, Joseph and Hyrum Smith voluntarily surrendered themselves to the constable who had attempted to bring them to Carthage on the original riot warrant. Almost immediately thereafter, they were arrested also on a warrant sworn out by a private citizen for treason against the State of Illinois for declaring martial law in Nauvoo.³⁰ This second arrest had unfortunate consequences for the prisoners, because they had much less chance of obtaining a release on bail from the capital offense of treason than from the relatively minor charge of riot.³¹ That after-

²² *Id.* at 487.

²³ *Id.* at 488-91. Wells had no authority to render a judgment of acquittal. See note 17 *supra*. Later, after Joseph Smith's death, some of the defendants were again tried for riot, this time before a jury in the circuit court. All were acquitted. FORD, HISTORY OF ILLINOIS 368-69 (1854).

²⁴ 6 SMITH 504-24, 528, 531-32.

²⁵ *Id.* at 536.

²⁶ *Id.* at 540. "No person shall, for the same offense, be twice put in jeopardy of his life or limb" ILL. CONST. art. VIII, § 11 (1818). It is interesting to note that Joseph Smith only claimed to have been tried *once* for the charge. He did not rely on the original trial before the municipal court. See note 17 *supra*.

²⁷ 6 SMITH 540.

²⁸ *Id.* at 548-49.

²⁹ *Id.* at 550.

³⁰ FORD, HISTORY OF ILLINOIS 337 (1854); 6 SMITH 561-62.

³¹ See note 37 *infra*.

noon the prisoners were taken before a Carthage justice of the peace, Robert F. Smith, who was also the captain of the Mormon-hating Carthage militia, and not the justice who had issued the original writ.³² At this preliminary hearing the justice fixed 500 dollars bail for each defendant on the riot charge. However, when this amount was promptly posted, the justice adjourned the proceedings and left the courthouse without calling the treason case, thus compelling the prisoners to remain in the custody of the constable under arrest for that offense.³³ Later that evening the prisoners were hustled into the Carthage County jail by the constable and militia under Robert F. Smith's command pursuant to a mittimus³⁴ which recited that they had been examined on the treason charge but that trial had been postponed by reason of the absence of a material witness — Francis M. Higbee.³⁵ The statement in the mittimus was false; the examination had not been held; and the prisoners were thus committed for treason without an opportunity to be heard on the charges.

On the following day, June 26, the prosecution sought to remedy the defect in the mittimus by again bringing the prisoners before Robert F. Smith for examination on the treason charge. None of defendants' witnesses were present, however, so defendants requested and the court granted a one-day continuance and subpoenas for witnesses in Nauvoo.³⁶ No question of bail was raised, apparently because a justice of the peace could not admit to bail persons charged with treason.³⁷ Later that evening Robert F. Smith, without any consultation with the defendants or their counsel, altered the return day on the subpoenas to June 29, thus assuring that the defendants would be imprisoned without a hearing at least until that day.³⁸

On the morning of June 27, 1844, Governor Ford released most of the 1200 to 1300 militiamen then under arms in Carthage. But instead of ordering them to march to their homes for dismissal, he disbanded them in or near Carthage. To guard the prisoners at the jail, Ford selected the Carthage Grays, the company commanded by Robert F. Smith that had been so notorious for their uproarious conduct and for their threats toward the prisoners.³⁹ With a few remaining troops the Governor then marched to Nauvoo, where he delivered a speech berating the inhabitants for civil disobedience.

³² 6 SMITH 567. Joseph Smith's enemies, who castigated him for blending civil, military, and ecclesiastical authority in Nauvoo, apparently did not hesitate to make use of some of these same combinations when they had him in their power.

³³ See *id.* at 568.

³⁴ A mittimus is a written order from a court or magistrate commanding an officer to convey the named person to prison and commanding the jailer to receive and safely keep him until he shall be delivered by due course of the law.

³⁵ 6 SMITH 569-70; 7 *id.* at 85.

³⁶ 6 *id.* at 596-97.

³⁷ Ill. Rev. Stat. § 3, at 221 (1833). Justices and judges of the supreme and circuit courts seem to have had power to issue bail in treason cases. Ill. Rev. Stat. § 3, at 220 (1833). The ILLINOIS CONSTITUTION, art. VIII, § 13 (1818), stated "that all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption is great. . . ."

³⁸ 6 SMITH 600.

³⁹ *Id.* at 606-07. By these acts, according to one historian, Ford "laid himself wide open for all time to the charge by pro-Mormons of collaborating with the assassination of the Smith brothers." Gayler, *Governor Ford and the Death of Joseph and Hyrum Smith*, 50 J. ILL. HISTORICAL Soc'y 391, 400 (1957).

Shortly after five o'clock on the afternoon of June 27, a mob of about a hundred men with blackened faces, apparently composed largely of members of the disbanded militia and perhaps also including some of the proprietors of the *Expositor*,⁴⁰ overcame the token resistance of the militia guards, and shot Joseph and Hyrum Smith to death in their room in the jail. Two fellow prisoners survived to record the brutal details.⁴¹ This concluded the inexorable chain of events set in motion by the destruction of the *Nauvoo Expositor*.

II. THE *Expositor*

Nauvoo citizens had been notified of the coming of the *Expositor* by a prospectus issued May 10, 1844. Sylvester Emmons, a non-Mormon member of the Nauvoo City Council, was named editor, and William and Wilson Law, Francis and Chauncey Higbee, Robert and Charles Foster, and Charles Ivins signed as publishers. The prospectus declared that a part of the newspaper's columns would be devoted to advocating free speech, religious tolerance, unconditional repeal of the Nauvoo Charter, disobedience to political revelations, hostility to any union of church and state, censure of gross moral imperfections wherever found, and, "in a word, to give a full, candid, and succinct statement of FACTS AS THEY REALLY EXIST IN THE CITY OF NAUVOO..."⁴² The publishers further declared their intent to "use such terms and names as they deem proper, when the object is of such high importance that the end will justify the means."⁴³

The first and only issue of the *Nauvoo Expositor*, the four-page issue of Friday, June 7, 1844, was more sensational than distinguished.⁴⁴ While the paper contained a short story, some poetry, a few news items (mostly copied from eastern newspapers), and a scattering of ads, it was principally devoted to attacking Joseph and Hyrum Smith and their unnamed associates in the Church and in the city government. With "lame grammar and turgid rhetoric" that John Hay termed dull or laughable,⁴⁵ the paper assailed the Mormon leaders on three fronts: religion, politics, and morality. A summary of the most prominent charges will be set forth here as a basis for the discussion to follow.

A. Religion

The religious items are all contained in a "Preamble, Resolutions and Affidavits, of the Seceders from the Church at Nauvoo," which, an editor's note explains, is included in order to give the public the facts about the schism in the Church of Jesus Christ of Latter-day Saints.⁴⁶ This lengthy document

⁴⁰ See 7 SMITH 143-46.

⁴¹ 6 *id.* at 616-22.

⁴² *Id.* at 444.

⁴³ *Ibid.*

⁴⁴ The excerpts from the *Nauvoo Expositor* that appear in the text were taken from an original copy in the Illinois State Historical Library at Springfield, Illinois, where it was said that there are only two known original copies in existence.

⁴⁵ Hay, *The Mormon Prophet's Tragedy*, The Atlantic Monthly, Dec. 1869, pp. 669, 670.

⁴⁶ *Nauvoo Expositor*, June 7, 1844, p. 1, col. 5. The "Preamble," "Resolutions," and "Affidavits" were reprinted in the Salt Lake Tribune, Oct. 6, 1910, p. 4; the "Preamble" and "Resolutions" were quoted at length in the Deseret Evening News, Dec. 21, 1869.

commences with an affirmation that the gospel as originally taught by Joseph Smith is true and that its pure principles would invigorate, enoble, and dignify man. However, it proclaims that Joseph Smith is a fallen prophet who had introduced many doctrines that were "heretical and damnable in their influence."⁴⁷ It was resolved that, inasmuch as Joseph and Hyrum Smith and other officials unnamed had "introduced false and damnable doctrines into the Church, such as a plurality of Gods above the God of this universe, and his liability to fall with all his creations; the plurality of wives, for time and eternity; the doctrine of unconditional sealing up to eternal life, against all crimes except that of shedding innocent blood . . .," they be denounced as apostates from the doctrine of Jesus.⁴⁸ The allegation about plurality of wives was buttressed by the affidavits of William and Jane Law and Austin Cowles to the effect that in 1843 Hyrum Smith had read them a written document which he said was a revelation from God sanctioning this practice.⁴⁹ The affiants' descriptions of the revelation were very brief, but, insofar as they were specific about its contents, they gave generally accurate descriptions of portions of the revelation on plural marriage, later published in the Church's *Doctrine and Covenants*.⁵⁰ The "Resolutions" also proposed that all persons presently preaching false doctrines come and make satisfaction and have their licenses renewed,⁵¹ presumably a bid for allegiance to the church recently organized by the seceders.

B. Politics

At the political level, the principal complaint was the Mormon leaders' attempts to unite church and state. Various editorial notes and news articles described these attempts and the "Resolutions" condemned them.⁵² The specific complaints were three in number.

First, the "Preamble" speaks vaguely of "examples of injustice, cruelty and oppression" accomplished by "the inquisitorial department organized in *Nauvoo*, by Joseph and his accomplices . . . of the most pernicious and diabolical character that ever stained the pages of the historian."⁵³ If suffered to persist, the paper predicted, this inquisition "will prove more formidable and terrible

⁴⁷ Nauvoo Expositor, June 7, 1844, p. 1, col. 6.

⁴⁸ *Id.* at 2, col. 3.

⁴⁹ *Id.* col. 4.

⁵⁰ DOCTRINE AND COVENANTS § 132 (scripture of the Church of Jesus Christ of Latter-day Saints).

⁵¹ Nauvoo Expositor, June 7, 1844, p. 2, col. 4.

⁵² *Ibid.* The gravamen of these complaints is well represented in the following passage quoted from the *Quincy Whig*:

It is not so much the particular doctrines, which Smith upholds and practices, however abominable they may be in themselves, that our citizens care about — as it is the anti-republican nature of the organization, over which he has almost supreme control — and which is trained and disciplined to act in accordance with his selfish will. The spectacle presented in Smith's case of a civil, ecclesiastical and military leader, united in one and the same person, with power over life and liberty, can never find favor in the minds of sound and thinking Republicans [*sic*].

Id. at 4, col. 3.

⁵³ *Id.* at 2, col. 3.

to those who are found opposing the iniquities of Joseph and his associates, than even the Spanish Inquisition did to heretics as they termed them.”⁵⁴ Perhaps as an example of this inquisition — the only specific one given in the paper — the next paragraph alleges that the procedure used and the result reached in the excommunication of William and Wilson Law and R. D. Foster was contrary to Church law.

Second, an “Introductory” by the editor bitterly protested the Nauvoo authorities’ use of the writ of habeas corpus to defy the law by inquiring into the guilt or innocence of prisoners and by releasing prisoners arrested or held in custody pursuant to the authority of the United States or the State of Illinois.⁵⁵

The third specific complaint on the subject of politics related to the candidacies of Joseph and Hyrum. Excerpts from Joseph’s letter to Henry Clay and from his *Views on the Powers and Policy of the Government of the United States* were quoted and ridiculed.⁵⁶ The “Resolutions” of the seceders submitted that this bid for political power was not pleasing to God,⁵⁷ and an open letter to the citizens of Hancock County by Francis M. Higbee argued that the citizens of the county should defeat the Smiths on sound self-interest, citing the candidates’ alleged immoralities (discussed later herein), Joseph’s being under indictment for adultery and perjury, the candidates’ defiance of the law by using habeas corpus to rescue fugitives from justice, and the dangerous tendencies of their attempts for civil power.⁵⁸ Both the editor’s “Introductory” and Higbee’s letter coupled opposition to the candidates with fervent pleas that the voters elect men who would, as Higbee put it, “go for the unconditional repeal of the Nauvoo Charter . . . whether they be Whig or Democrat. . . .”⁵⁹ The “Introductory” is cast in terms of an appeal to “the old citizens,” who had settled and organized the county and whose rights the Nauvoo combination allegedly had marked for “utter destruction.” The editor did not openly advocate mob action, but he did not let that possibility remain unnoticed:

The question is asked, will you bring a mob upon us? In answer to that, we assure all concerned, that we will be among the first to put down anything like an illegal force being used against any man or set of men. . . . [But] if it is necessary to make show of force, to execute legal process, it will create no sympathy in that case to cry out, we are mobbed.⁶⁰

C. Morality

The third and most pervasive theme was the alleged immorality of Joseph and his associates, of whom Hyrum was the only one specifically named. Some of these charges related to financial affairs or vague implications of murderous conduct. Most concerned sexual behavior.

⁵⁴ *Ibid.*

⁵⁵ *Id.* col. 6. See the discussion of this subject in text following note 109 *infra*.

⁵⁶ *Id.* at 3, col. 2. The quoted material appears in 6 SMITH 207–08, 376–77.

⁵⁷ Nauvoo Expositor, June 7, 1844, p. 2, col. 4.

⁵⁸ *Id.* at 3, col. 4.

⁵⁹ *Id.* col. 5.

⁶⁰ *Id.* at 2, col. 5.

The "Resolutions" of the seceders from the Church made serious charges of misuse of Church funds, of which the following is representative:

[W]e therefore consider the injunction laid upon the saints compelling them to purchase property of the Trustee in trust for the Church, is a deception practiced upon them; and that we look upon the sending of special agents abroad to collect funds for the Temple and other purposes as a humbug practiced upon the saints by Joseph and others, to aggrandize themselves, as we do not believe that the monies and property so collected, have been applied as the donors expected, but have been used for speculative purposes, by Joseph, to gull the saints the better on their arrival at Nauvoo, by buying the lands in the vicinity and selling again to them at tenfold advance . . .⁶¹

The general charges of knavery were numerous, varied, and unrestrained. Higbee's letter about the political candidates said this of Joseph:

Query not then for whom you are voting; it is for one of the blackest and basest scoundrels that has appeared upon the stage of human existence since the days of Nero, and Caligula. . . . Support not that man who is spreading death, devastation and ruin throughout your happy country like a tornado.⁶²

The Higbee letter concluded its opposition to Hyrum Smith by saying: "We want no base seducer, liar and perjured representative, to represent us in *Springfield* . . ." ⁶³ In relation to a letter (not quoted in the *Expositor*) that J. H. Jackson (an associate of the *Expositor* publishers) was said to have sent to the *Warsaw Signal* about the Mormon prophet, an editor's note states:

It will be perceived that many of the most dark and damnable crimes that ever darkened human character, which have hitherto been to the public, a matter of *rumor* and *suspicion*, are now reduced to *indisputable facts*. We have reason to believe, from our acquaintance with Mr. Jackson, and our own observation, that the statements he makes are true; and in view of these facts, we ask, in the name of heaven, where is the safety of our lives and liberties, when placed at the disposal of such heaven daring, hell deserving, God forsaken villains. Our blood boils while we refer to these blood thirsty and murderous propensities of men, or rather *demons* in human shape, who, not satisfied with practising their dupes upon a credulous and superstitious people, must wreak their vengeance upon any who may dare to come in contact with them.⁶⁴

The reference in the "Preamble" to doctrines "taught secretly, and denied openly, (which we know positively is the case)" ⁶⁵ was undoubtedly a reference to the doctrine of polygamy. This subject was referred to repeatedly in the paper, sometimes by implication and sometimes directly. Emmons' editorial "Introductory" declared:

⁶¹ *Id.* col. 4.

⁶² *Id.* at 3, col. 5.

⁶³ *Ibid.*

⁶⁴ *Id.* col. 3.

⁶⁵ *Id.* at 1, col. 6.

That there does exist an order of things with the systematic elements of organization in our midst — a system which, if exposed in its naked deformity, would make the virtuous mind revolt with horror; a system in the exercise of which lays prostrate all the dearest ties in our social relations — the glorious fabric upon which human happiness is based — ministers to the worst passions of our nature, and throws us back into the benighted regions of the dark ages, we have the greatest reason to believe.⁶⁶

"We are earnestly seeking," the "Preamble" declares, "to explode the vicious principles of Joseph Smith, and those who practice the same abominations and whoredoms . . . It is absurd for men to assert that all is well, while wicked and corrupt men are seeking our destruction, by a perversion of sacred things; for all is *not* well, while whoredoms and all manner of abominations are practiced under the cloak of religion." ⁶⁷

"It is a notorious fact," the "Preamble" continues, as its charges begin to get specific, "that many females in foreign climes . . . have been induced, by the sound of the gospel, to forsake friends, and embark upon a voyage . . . as they supposed, to glorify God . . . But what is taught them on their arrival at this place?" They are soon visited and told that there are great blessings in store for the faithful and that "brother Joseph will see them soon, and reveal the mysteries of Heaven to their full understanding . . ." Later, the "harmless, inoffensive, and unsuspecting creatures" are requested to meet brother Joseph or some of the twelve apostles at some isolated spot. There, the "Preamble" alleges, the faithful follower of Joseph is sworn to secrecy upon a penalty of death and then told that God has revealed

that she should be his [Joseph's] Spiritual wife; for it was right anciently, and God will tolerate it again: but we must keep those pleasures and blessings from the world, for until there is a change in the government, we will endanger ourselves by practicing it — but we can enjoy the blessings of Jacob, David, and others, as well as to be deprived of them, if we do not expose ourselves to the law of the land. She is thunderstruck, faints, recovers, and refuses. The Prophet damns her if she rejects. She thinks of the great sacrifice, and of the many thousand miles she has traveled over sea and land, that she might save her soul from pending ruin, and replies, God's will be done, and not mine. The Prophet and his devotees in this way are gratified. The next step to avoid public exposition from the common course of things, they are sent away for a time, until all is well; after which they return, as from a long visit.⁶⁸

The "Preamble" then goes into a lengthy and detailed description of the injured feelings, the broken health, and the eventual untimely death of those "whom no power or influence could seduce, except that which is wielded by some individual feigning to be God . . ." — no one knowing the cause "except the foul fiend who perpetrated the diabolical deed." ⁶⁹

⁶⁶ *Id.* at 2, col. 5.

⁶⁷ *Id.* at 1, col. 6.

⁶⁸ *Id.* at 2, col. 1.

⁶⁹ *Ibid.*

The account continues with this lament:

Our hearts have mourned and bled at the wretched and miserable condition of females in this place . . . turned upon a wide world, fatherless and motherless, destitute of friends and fortune; and *robbed of that which nothing but death can restore.*⁷⁰

One of the most often repeated themes in the *Expositor* was the promise that future issues would be unrestrained in their exposure. The editor's "Introductory" declared:

We intend to tell the whole tale and by all honorable means to bring to light and justice, those who have long fed and fattened upon the purse, the property, and the character of injured innocence; — yes, we will speak, and that too in thunder tones, to the ears of those who have thus ravaged and laid waste fond hopes, bright prospects, and virtuous principles, to gratify an unhallowed ambition.⁷¹

And, so also from the "Preamble":

But Lo! it is sudden day, and the dark deeds of foul fiends shall be exposed from the house-tops. A departed spirit, once the resident of St. Louis, shall yet cry aloud for vengeance.

It is difficult — perhaps impossible — to describe the wretchedness of females in this place, without wounding the feelings of the benevolent, or shocking the delicacy of the refined; but the truth shall come to the world.⁷²

The foregoing summary is representative of the worst that the *Expositor* had to offer. Comment on this material will follow a review of the Nauvoo authorities' reaction to the paper.

III. THE SUPPRESSION

The first issue of the *Expositor* produced a furious reaction from the citizens of Nauvoo, which, as one observer reported at the time, "raised the excitement to a degree beyond control, and threatened serious consequence."⁷³ Joseph Smith later gave this explanation to the Governor:

[C]an it be supposed that after all the indignities to which we have been subjected outside, that this people could suffer a set of worthless vagabonds to come into our city, and right under our own eyes and protection, vilify and calumniate not only ourselves, but the character of our wives and daughters, as was impudently and unblushingly done in that infamous and filthy sheet? There is not a city in the United States that would have suffered such an indignity for twenty-four hours.

Our whole people were indignant, and loudly called upon our city authorities for redress of their grievances, which, if not attended to they themselves would have taken the matter into their own hands, and have summarily punished the audacious wretches, as they deserved.⁷⁴

⁷⁰ *Ibid.*

⁷¹ *Id.* at 3, col. 1.

⁷² *Id.* at 2, col. 2.

⁷³ 6 SMITH 470. See generally 2 ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH 229 (1930); 6 SMITH 446; 7 *id.* at 61.

⁷⁴ 6 SMITH 581.

The temper of the times suggests that the prospect of mob action against the *Expositor* press was real and not merely speculative. One historian has said that there were sixteen instances of violence in Illinois between 1832 and 1867 to presses or editors who dared to express highly controversial views contrary to those generally held in the community.⁷⁵ Perhaps the best known incidents were those involving Elijah Lovejoy, who had three different printing presses destroyed at Alton, Illinois, between 1835 and 1837 and who was finally murdered by a proslavery mob that destroyed his fourth press.⁷⁶ There were at least seven recorded instances of mob violence against newspapers in other states in the 1830's and 1840's.⁷⁷

On Saturday, June 8, 1844, the day following issuance of the *Expositor*, the Nauvoo City Council met for a total of six and a half hours in two sessions. The council then adjourned until Monday, June 10, when it met for an additional seven and a half hours.⁷⁸ A "brief synopsis" of the council proceedings, giving a detailed account of what took place, was published.⁷⁹

Most of Saturday was spent discussing the character and conduct of the various publishers of the *Expositor*, particularly William Law and Robert Foster. Various citizens and councilors gave testimony that these men were guilty of oppressing the poor, counterfeiting, theft, conspiracy to murder, seduction, and adultery. The council also suspended Councilor Emmons for slandering that body.⁸⁰ On Monday additional witnesses were heard on the immorality of the *Expositor* publishers.⁸¹ Then the council turned its attention to the *Expositor* itself.

Mayor Joseph Smith first expressed a concern, often repeated in the council deliberations, that what the opposition party was trying to do by the paper was to destroy the peace of Nauvoo, excite its enemies, and raise a mob to bring death and destruction upon the city.⁸² After reading the editor's "Introductory" aloud to the council, he argued that the paper was "a nuisance — a greater nuisance than a dead carcass," and urged the council to make some provision for removing it.⁸³ This was not the first time that the city council had been urged to exercise the power given in its legislative charter "to declare

⁷⁵ DAVIS, *THE STORY OF THE CHURCH* 335–36 (6th ed. 1948). See 3 COLE, *THE CENTENNIAL HISTORY OF ILLINOIS* 303–04 (1919), for accounts of the mob destruction of the Chester Picket Guard and the temporary military suppression of the *Chicago Times* and *Jonesboro Gazette* for voicing unpopular sentiments during the Civil War.

⁷⁶ See GILL, *TIDE WITHOUT TURNING* (undated).

⁷⁷ MOTT, *AMERICAN JOURNALISM* 263, 307 (3d ed. 1941).

⁷⁸ 6 SMITH 430, 432.

⁷⁹ The synopsis was published as an extra edition by the *Nauvoo Neighbor*, a Mormon newspaper. It is reproduced in GREGG, *THE PROPHET OF PALMYRA*, 245–68 (1890) and in 6 SMITH 434–48. Councilor John Taylor's brief account of the proceedings appears in 7 *id.* 61–63.

⁸⁰ 6 SMITH 435–39.

⁸¹ *Id.* at 439–42. Since the scandalous testimony before the council regarding the private lives of the *Expositor* publishers was published by a Mormon newspaper, note 79 *supra*, the council was at least indirectly responsible for a newspaper issue as defamatory as the one they protested.

⁸² *Id.* at 438, 442.

⁸³ *Id.* at 441.

what shall be a nuisance, and to prevent and remove the same.”⁸⁴ In October 1841, before Joseph Smith became mayor, a grog shop had been declared a nuisance and removed by order of the city council.⁸⁵

The *Expositor* prospectus was next studied, after which the mayor read Higbee's letter aloud to the council. Hyrum Smith then announced himself in favor of declaring the *Expositor* a nuisance.⁸⁶ Councilor John Taylor said that no city on earth would bear such slander and that he was in favor of active measures. He read from the United States Constitution on freedom of the press and concluded: “We are willing they should publish the truth; but it is unlawful to publish libels. The *Expositor* is a nuisance, and stinks in the nose of every honest man.”⁸⁷

After the mayor read the provisions of the Illinois Constitution on the responsibility of the press for its constitutional liberties,⁸⁸ Councilor Stiles read Blackstone's definition of and comments on abatement of nuisances and declared himself in favor of suppressing any more slanderous publications. Hyrum Smith stated that the best way to suppress it was to smash the press and pi (scatter) the type. Alderman Bennett pointed to a libel in the paper concerning the municipal court's action in the case of Jeremiah Smith, and said he considered the paper a public nuisance.⁸⁹

Councilor Warrington, a non-Mormon, considered the proposed action rather harsh. He suggested assessing a heavy fine for libels and then proceeding to quiet the paper if it did not cease publishing libels. Hyrum Smith replied that, in view of the financial condition of the publishers, there would be little chance of collecting damages for libels.⁹⁰ Alderman Elias Smith favored putting an end to the paper and “believed by what he had heard that if the City Council did not do it, others would.”⁹¹ Other aldermen and councilors supported the proposition, urging that there was no reason to suppose that the publishers would desist if fined or imprisoned and that it was unwise “to give them time to trumpet a thousand lies.”⁹² Councilor Phelps, a lawyer, then expounded on the Constitution, charter, and laws, and concluded that the power to declare a nuisance was one of the charter powers and that a resolution containing a declaration to that effect was all that was required.⁹³

So far as the synopsis discloses, the council spent a great deal of time discussing means of stopping the *Expositor* and of exposing the character of its

⁸⁴ See text accompanying note 139 *infra*.

⁸⁵ 4 SMITH 442, 444.

⁸⁶ 6 *id.* at 445.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* The synopsis says this was ILL. CONST. art. VIII, § 12. This section number was probably a misprint, for § 12 merely states the common law axiom that there should be a remedy for every wrong. The one actually read to the council was probably § 22, which contains the provisions on free speech and free press. This provision is quoted in the text accompanying note 169 *infra*.

⁸⁹ 6 SMITH 445.

⁹⁰ *Id.* at 446.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Id.* at 447.

publishers, but very little time considering and refuting its contents. The synopsis does recite that the paper's representations about the doctrine and practice of plural marriage were denied,⁹⁴ and that the councilors made numerous general references to the paper's libelous nature without, however, specifically identifying the offensive statements.⁹⁵

By far the most pervasive objection to the *Expositor* was the fear that seemed to haunt the council that, if allowed to continue, this paper would be the means of destroying the peace and happiness of the city by arousing mob violence against its inhabitants.⁹⁶ The following is representative of this theme:

Councilor Phineas Richards said that he had not forgotten the transaction at Haun's Mill [where 30 Mormon men and boys were shot down in cold blood by a Missouri mob: 17 dead and 13 wounded], and that he recollected that his son George Spencer then lay in the well [where the dead had been buried hurriedly by the survivors] . . . without a winding-sheet, shroud or coffin. He said he could not sit still when he saw the same spirit raging in this place. He considered the publication of the *Expositor* as much murderous at heart as David was before the death of Uriah; was prepared to take stand; by the Mayor, and whatever he proposes; would stand by him to the last. The quicker it is stopped the better.⁹⁷

Finally, at about 6:30 p.m. on Monday, June 10, the council resolved that the issues of the *Nauvoo Expositor* and the printing office from whence it issued were "a public nuisance . . . and the Mayor is instructed to cause said printing establishment and papers to be removed without delay, in such manner as he shall direct."⁹⁸ The mayor promptly ordered the marshal to "destroy the printing press from whence issues the *Nauvoo Expositor*, and pi the type of said printing establishment in the street, and burn all the *Expositors* and libelous handbills found in said establishment" ⁹⁹ He also ordered the Nauvoo Legion to be in readiness to execute the city ordinances if the marshal should need its services.

By eight o'clock that evening, the marshal had made a return to the order.¹⁰⁰ Accompanied by a large crowd of citizens and by a number of the militia, he had proceeded to the *Expositor* office, destroyed the press, and scattered the type as ordered.

According to the criminal charges soon filed against the principals in this action, the manner of execution of the council's order constituted a riot. This crime was committed when two or more persons did an unlawful act "with force or violence against the person of another" or did a lawful act "in a violent

⁹⁴ *Id.* at 441-42.

⁹⁵ *Id.* at 443, 445-46.

⁹⁶ *Id.* at 438, 442, 446. Alderman Orson Spencer declared: "Shall they be suffered to go on, and bring a mob upon us, and murder our women and children, and burn our beautiful city! No!" *Id.* at 446.

⁹⁷ *Id.* at 447. See 3 *id.* at 182-87, 325-26 for an account of the Haun's Mill massacre.

⁹⁸ 6 *id.* at 448.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

and tumultuous manner"¹⁰¹ At the two subsequent trials for riot numerous witnesses, including several visitors from cities outside Illinois, testified without significant contradiction that the whole transaction was accomplished quietly and without noise or tumult.¹⁰² The marshal demanded the press, Higbee refused, the marshal opened the door (one witness said he ordered it "forced," another said "a knee was put against it," another named a man who had opened it; several said there was little or no noise or delay at its opening), Higbee left the premises unhindered, and from seven to twelve men went inside and carried out the press and type. Except for one minor deviation, all witnesses also agreed that there was no violence, and that nothing was destroyed or damaged that did not pertain to the press.¹⁰³ The contemporaneous account of Charles A. Foster, one of the *Expositor* publishers, states that the police broke down the door with a sledge hammer "injuring the Building very materially," but in other respects he does not contradict testimony given at trial.¹⁰⁴

IV. THE LEGALITY OF THE COUNCIL'S ACTION

A. An Evaluation of the Expositor Charges

The legality of the council's action in suppressing the *Expositor* depends upon the nature of the charges in the *Expositor* and the reaction which the city councilors could reasonably conclude that they were likely to produce in the community and the surrounding areas. While a weighing of conflicting evidence on the truth or falsity of these charges is beyond the scope of this article, some of the charges involve facts that are essentially undisputed or interesting questions of law on which some opinion can be rendered. In addition, it is possible to make some fairly reliable surmises about the probable community reaction in and out of Nauvoo.

1. *Politics.* The *Expositor's* general complaints about the union of the authority of church and state in Nauvoo were essentially true. Notwithstanding the presence of non-Mormons on the city council, the dominance of Mormon

¹⁰¹ Ill. Rev. Stat. § 117, at 197 (1833), quoted in note 9 *supra*.

¹⁰² 6 SMITH 456-58, 488-91.

¹⁰³ *Ibid.* This account is also borne out by contemporary letters and an affidavit reproduced in *id.* at 468-70; 7 *id.* at 130. One witness, who said he was at work in the printing establishment on the night the press was destroyed, testified that some valuable papers and a desk belonging to Dr. Foster were destroyed. 6 *id.* at 489. On cross examination, however, he admitted that he simply "presumed" they were destroyed, and that he had no knowledge of the matter. *Ibid.* Several other witnesses, present during the time, swore that no desk or other property was carried out and destroyed. *Id.* at 490-91.

¹⁰⁴ Charles A. Foster's letter of June 10, 1844, to Thomas C. Sharp, the editor of the *Warsaw Signal*, reproduced here in part by permission of the Yale University Library, states that after two days in extra session, the Nauvoo City Council enacted an ordinance declaring the *Nauvoo Expositor* a nuisance and directed the police to destroy the press and all materials connected with it. The letter then states:

Accordingly, a company consisting of some, 200 men, armed & equipped, with Muskets, Swords, Pistols, Bowicknives, Sledge Hammers &c assisted by a crowd of several hundred minions, who volunteered their services on the occasion, marched to the building, & breaking the door open with a Sledge Hammer, commenced the work of desperation & destruction they tumbled the press & Materials into the Street & set fire to them & demolished the machinery with sledge Hammers & injuring the Building very materially.

Church leaders in every branch of government in the city and legion was beyond question. In protesting this condition, in urging its readers to vote against Joseph and Hyrum Smith in their election contests, and even in advocating repeal of the Nauvoo Charter, the *Expositor* was performing the traditional function of a free press. The name calling accompanying the *Expositor's* political advocacy was pretty rough, but not particularly unique in view of the prevailing style of political commentary of that day.¹⁰⁵ However offensive this aspect of the newspaper's copy may have been to the individuals in power, it offered no conceivable justification for harassment, much less suppression.

The *Expositor's* most specific complaints against Joseph's and Hyrum's political conduct or their qualifications for office were the charges that they had defied the law by using the writ of habeas corpus: (a) to release prisoners held in the custody of state or federal authorities and (b) to try the guilt or innocence of parties who applied for the writ. An evaluation of these charges requires a discussion of the habeas corpus law in Illinois in 1844.

Honored as the "highest safeguard of liberty," the writ of habeas corpus was the command by which a court or judge required a person who had another in custody to produce the prisoner and explain the cause of his detention.¹⁰⁶ In Illinois during the Nauvoo period, the law of habeas corpus was the common law, as modified by the Illinois Habeas Corpus Act of 1827 and supplementary legislation. These laws authorized the writ of habeas corpus to be issued by the Illinois Supreme Court, by various circuit courts, or by any of the judges of these courts or the masters in chancery.¹⁰⁷ In addition — and this was the source of contention — the legislative charter of the city of Nauvoo gave its municipal court "power to grant writs of habeas corpus in all cases arising under the ordinances of the city council."¹⁰⁸ The *Expositor's* complaint related to several instances where the Nauvoo court had issued this writ to bring before it prisoners in the custody of state or federal officers, held hearings on the prisoners' guilt or innocence, and ordered them discharged.¹⁰⁹

The legality of this action will be considered first from the standpoint of the special problems involved in issuing the writ for a federal prisoner. In terms of today's law, any attempt by a municipal court — the judicial arm of a lesser sovereignty deriving its authority from state law — to free prisoners held by the supreme sovereignty of federal law would clearly be illegal. But the assertion of state jurisdiction over federal prisoners was not an unusual phenomenon in a pre-Civil War society where the doctrine of nullification was still untested and where the extent of "states' rights" was still problematical. Indeed, courts that had ruled on the matter prior to 1844 were practically unanimous in the

¹⁰⁵ See, e.g., MOTT, *AMERICAN JOURNALISM* 237, 255, 263, 310 (3d ed. 1941); MOTT, *A HISTORY OF AMERICAN MAGAZINES 1741-1850*, at 159-60 (1930); Truth's Advocate and Monthly Anti-Jackson Expositor, Jan.-Oct., 1821 (Cincinnati newspaper).

¹⁰⁶ For a general discussion of the law of habeas corpus, particularly during this period, see Oaks, *Habeas Corpus in the States — 1776-1865*, 32 U. CHI. L. REV. 243 (1965).

¹⁰⁷ Ill. Rev. Stat. § 1, at 322 (1833) (Habeas Corpus Act of 1827); Ill. Laws 1834-35, § 2, at 32 (masters in chancery, appointed in each county, authorized to issue habeas corpus).

¹⁰⁸ Ill. Laws 1840, § 17, at 55.

¹⁰⁹ The instances are described in note 124 *infra*.

opinion that state courts had the power to issue the writ of habeas corpus for persons held by federal officers.¹¹⁰ In 1858, a leading authority on habeas corpus law declared: "It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States."¹¹¹ Among the cases relied upon were recent decisions by the supreme courts of Ohio and Wisconsin holding that the courts of those states had properly issued their writs of habeas corpus for prisoners arrested by federal officers or tried, convicted, and imprisoned by federal courts.¹¹² It was not until 1859, when the Supreme Court of the United States reversed the Wisconsin judgment in the leading case of *Ableman v. Booth*,¹¹³ that it was established that persons held in federal custody could not be freed by a writ of habeas corpus issued by a state court. Consequently, there was nothing in federal statutory or state common law that forbade a court like Nauvoo's that the state had authorized to issue the writ of habeas corpus from issuing the writ for a federal prisoner.

It is equally true, however, that there was nothing to prevent a state from voluntarily forbidding its courts to interfere with the custody of federal prisoners, and Illinois had done just that in the following provision of its Habeas Corpus Act of 1827:

Sec. 8. No person shall be discharged under the provisions of this act who is in custody under a commitment, for any offence exclusively cognizable by the courts of the United States, or by order, execution, or process issuing out of such courts, in cases where they have jurisdiction. . . .¹¹⁴

Did this provision apply to the municipal court of Nauvoo? The Nauvoo authorities could argue forcefully that it did not. By its terms section 8 only applied to federal prisoners "discharged under the provisions of this act" — the Habeas Corpus Act of 1827, which only applied to habeas corpus issued by the supreme and circuit courts and their judges. The habeas corpus authority of the Nauvoo Municipal Court was granted by the Nauvoo Charter in 1840. Consequently, although the issue is not free from doubt, it can be urged that the prohibition in section 8, quoted above, qualified the habeas corpus power of the supreme and circuit courts and their judges, but not the habeas corpus powers of the Nauvoo Municipal Court. This argument is further reinforced by the fact that the Nauvoo Charter was granted some years after the Habeas Corpus Act, so that the terms of the charter should prevail in the event of any inconsistency, or at least should be construed with an eye to the fact that the general assembly was aware of its prior restriction on state habeas corpus for federal prisoners, and would have been explicit if it had meant to impose a

¹¹⁰ For a thorough list of these cases see Oaks, *supra* note 106, at 275 nn.166 & 167. These decisions were discussed and approved in then-current editions of volume 1 of Chancellor Kent's influential *Commentaries on American Law* 400 (4th ed. 1840).

¹¹¹ HURD, *HABEAS CORPUS* 166 (1858).

¹¹² In the Matter of Collier, 6 Ohio St. 55 (1856); *In re Booth & Rycraft*, 3 Wis. 157 (1855); *In re Booth*, 3 Wis. 1 (1854).

¹¹³ 62 U.S. (21 How.) 506 (1859).

¹¹⁴ Ill. Rev. Stat. § 8, at 326 (1833).

similar restriction on the Nauvoo court. For the reasons just discussed, there seems to have been considerable basis for the contention that the Nauvoo court could properly issue its writ of habeas corpus for a federal prisoner.

Since the city of Nauvoo derived its authority from state law, the question whether the municipal court had jurisdiction over state prisoners was simply a question whether the legislature had given the court that authority in the Nauvoo City Charter. The relevant charter provision, giving the municipal court "power to grant writs of *habeas corpus* in all cases arising under the ordinances of the city council," might have been read narrowly so that the court would only have power to issue the writ in those cases where the prisoner was confined by the authority of the city of Nauvoo. That was the interpretation urged by Governor Ford and his predecessor, Governor Carlin.¹¹⁵ But this was not the only permissible construction.

The habeas corpus provision could also be read more broadly to give the court power to investigate any confinement, state or federal, within the city of Nauvoo that was in violation of the terms of a valid ordinance of the city of Nauvoo. During the summer and fall of 1842, when Missouri was striving feverishly to extradite Joseph Smith, the Nauvoo authorities relied on this later interpretation to enact an ordinance which provided that, whenever any person should be "arrested or under arrest" in Nauvoo, he could be brought before the municipal court by a writ of habeas corpus. The court was thereupon required to "examine into the origin, validity and legality of the writ of process, under which such arrest was made . . ." ¹¹⁶ Since this portion of the ordinance does not seem to have exceeded the council's charter authority to make ordinances "as they may deem necessary for the peace, benefit, good order, regula-

¹¹⁵ 6 SMITH 535; 5 *id.* at 154.

¹¹⁶ *Id.* at 88. The full text of the pertinent portions of this important ordinance reads as follows:

Sec.1. Be it ordained by the city council of the city of Nauvoo, that in all cases where any person or persons, shall at any time hereafter, be arrested or under arrest in this city, under any writ or process, and shall be brought before the municipal court of this city, by virtue of a writ of habeas corpus, the court shall in every such case have power and authority, and are hereby required to examine into the origin, validity and legality of the writ of process, under which such arrest was made, and if it shall appear to the court, upon sufficient testimony that said writ or process was illegal, or not legally issued, or did not proceed from proper authority, then the court shall discharge the prisoner from under said arrest; but if it shall appear to the court that said writ or process had issued from proper authority, and was a legal process, the court shall then proceed and fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court, and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witness, so that a fair and impartial trial and decision may be obtained in every such case.

Sec.2. And be it further ordained that if upon investigation it shall be proven before the municipal court, that the writ or process has been issued, either through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation, contrary to the constitution of this state, or the Constitution of the United States, the said writ or process shall be quashed and considered of no force or effect, and the prisoner or prisoners shall be released and discharged therefrom.

Id. at 87-88. This ordinance replaced a similar but briefer one enacted a month earlier. *Id.* at 57.

tion, convenience and cleanliness of said city,"¹¹⁷ it probably offers a valid basis for the issuance of the writ of habeas corpus if the broader construction of the charter's habeas corpus powers is the correct one.¹¹⁸

The type of city government created in the Nauvoo Charter suggests that the legislature contemplated a wider use of the unique habeas corpus power granted to the municipal court than simply challenging the validity of confinements by the authority of the city of Nauvoo. The legislative charter provided that the municipal court should consist of the mayor and aldermen of the city,¹¹⁹ the same individuals who would normally be responsible for the arrest and confinement of anyone imprisoned under the authority of the city. Thus, if imprisonments brought about by its own membership were the only kinds of official restraints that the municipal court could examine by habeas corpus, the habeas corpus power conferred in the charter would be practically meaningless. In this view, the charter must contemplate that the municipal court's habeas corpus power be available to review some confinements other than those initiated by the membership of the municipal court itself.

In addition, the broad construction of the city's habeas corpus powers as permitting a challenge of confinements by state or federal authority is more consonant with the view then prevailing that the legislature had been extremely generous in the powers it granted in the Nauvoo City Charter. The session of the General Assembly of Illinois that granted the Nauvoo Charter seems to have deliberately attempted to create the impression that the city lawmakers were not to be inhibited by state or federal law.¹²⁰ The charter gave the city

¹¹⁷ Ill. Laws 1840, § 11, at 54.

¹¹⁸ A later ordinance on habeas corpus, passed November 14, 1842, undoubtedly exceeded the charter authority as to the range of the municipal court's writ. This lengthy ordinance, which for the most part simply enacted the provisions of the Illinois Habeas Corpus Act of 1827 as a city ordinance, purported to give the municipal court power to issue the writ of habeas corpus for "any person or persons . . . committed or detained for any criminal or supposed criminal matter," apparently without regard to whether they were detained in Nauvoo or even in the state of Illinois. In a speech delivered in June 1843, Joseph Smith is quoted as saying that the municipal court "has all the power to issue and determine writs of habeas corpus within the limits of this state . . ." Roberts, *Introduction to 4 SMITH* at xxii. In another more complete version of the same speech, he is quoted as saying "within the limits of this city . . ." 5 SMITH 466. See *id.* at 289, 465-73 for a discussion by Joseph Smith of the legal basis for the issuance of the writ of habeas corpus by the Nauvoo Municipal Court, which he said "had more power than any other court in the state . . ." *Id.* at 473. See also Roberts, *Introduction to 4 SMITH* at xxii-xxiv.

Another possible point of illegality was the provision of the earlier ordinance, quoted in note 116 *supra*, that authorized the court (if the warrant was found legal) to "proceed and fully hear the merits of the case, upon which said arrest was made . . ." This scope of review was perfectly acceptable if it merely meant that the court hearing the habeas corpus petition should determine whether there was probable cause for the arrest. See note 128 *infra*. If it meant to authorize the municipal court to hold the final trial on the merits of the case it was probably illegal since the general assembly had given the municipal court no criminal jurisdiction. See generally note 17 *supra*.

¹¹⁹ Ill. Laws 1840, § 17, at 55.

¹²⁰ In his *History of Hancock County* 274 (1880), Thomas Gregg wrote that the Nauvoo Charter seemed to have been "contrived to give the Mormons a system of government so far as possible independent of the rest of the state," for which it purposely omitted the charter provision "guarding against infringement of state or federal law" even though such a provision was "in all other charters granted at that session of the General Assembly . . ." It is true that although the Nauvoo Charter had the usual provisions against ordinances repugnant to the state or federal *constitutions*, Ill. Laws 1840, § 11, at 54, § 13, at 55, it did not have any provision against ordinances infringing state

such extraordinary powers that Governor Ford termed it "unheard of" and wrote that its provisions "seemed to give them power to pass ordinances in violation of the laws of the State, and to erect a system of government for themselves."¹²¹ In view of this popular (and adversary) appraisal of the scope of the charter powers, the better construction of the charter provision on habeas corpus jurisdiction would seem to have been the broader one adopted by the Nauvoo authorities.

Governor Ford conceded that the officials of Nauvoo "had been repeatedly assured by some of the best lawyers in the State who had been candidates for office before that people, that it [the municipal court] had full and competent power to issue writs of habeas corpus in all cases whatever."¹²² Historians have usually attributed the lawyers' advice to their ingratiating attempts to win political favor with the Mormons.¹²³ This prospect may have motivated the counselors, but the foregoing discussion shows that their advice had considerable support in the law of that time. The better construction of the charter provision gave the municipal court authority to issue its writ of habeas corpus for any confinement within the limits of the city — state or federal — that was in violation of any valid ordinance of the city council. The *Expositor's* first criticism of the Nauvoo court's habeas corpus actions was, therefore, legally unjustified.

The *Expositor's* second complaint about the Nauvoo writ of habeas corpus — that the Nauvoo authorities defied the law by using habeas corpus to try the guilt or innocence of parties who applied for the writ — was also unfounded. These complaints concern instances wherein individuals held under warrants of arrest in Nauvoo were given a writ of habeas corpus to bring them before the municipal court, which held a hearing upon their cases and gave them discharges.¹²⁴ A case in point, although obviously not the case specifically complained of by the *Expositor*, was the action of the municipal court in holding a hearing and releasing Joseph Smith and his codefendants from the custody of the Carthage marshal who had arrested them in Nauvoo for riot in the suppression of the *Expositor*.¹²⁵

or federal law, even though most of the other acts incorporating cities or towns during that session of the general assembly had such a provision. Ill. Laws 1840, § 5, at 58 (Quincy), § 4, at 318 (Macomb), § 7, at 323 (Galesburg), § 9, at 336 (Marion), § 7, at 345 (Tremont), § 8, at 350 (Rock Island).

¹²¹ FORD, HISTORY OF ILLINOIS 264-65 (1854). One recent observer concluded that the charter "practically created a 'state within a state,' " terming it "almost a unique document in the history of American Government." Burr, *The Charter of the Mormon City of Nauvoo*, Library of Congress Quarterly Journal of Current Acquisitions, Feb. 1949, p. 3. See also Roberts, *Introduction* to 4 SMITH at xxii-xxiv. Compare Burgess, *The Nauvoo Charter*, 9 J. OF HISTORY 2 (1916), which argues that some of the powers later cited by Burr were not unusual at all. Neither of these sources considers the features in note 120 *supra*.

¹²² FORD, HISTORY OF ILLINOIS 325 (1854). See 5 SMITH 466-68, 471-73. Another lawyer, adverse to the people of Nauvoo, also gave this opinion. *Id.* at 538-39.

¹²³ Roberts, *Introduction* to 6 SMITH at xxxi-xxxii.

¹²⁴ Joseph Smith's journal notes the following instances: 5 *id.* at 461-74 (Joseph Smith released from Governor's extradition warrant); 6 *id.* at 418-22 (Jeremiah Smith released from custody of two different federal marshals acting under writs issued by federal district judge). The court also used the writ to free persons seized under civil process. *Id.* at 80, 286.

¹²⁵ Discussed in text following note 12 *supra*.

But it is apparent that this action and most, if not all, of the others complained of were perfectly legal uses of the writ of habeas corpus.

Under Illinois law, typical of the state law of that period, a person who had been arrested was promptly taken before a judicial officer — typically a justice of the peace — for an examination to determine “the truth or probability of the charge exhibited against such prisoner or prisoners, by the oath of all witnesses attending”¹²⁶ The judicial officer would hear the evidence and then decide whether to commit the prisoner to jail to await trial or action of the grand jury, admit him to bail, or discharge him from custody. Although based upon evidence of guilt or innocence, the decision at the examination was only preliminary. If discharged, the prisoner could still be rearrested if additional evidence was secured. If held in jail or admitted to bail, he could still prove his innocence at his trial.

In Illinois most prisoners who had been arrested could obtain the same sort of hearing in advance of their examination by having themselves brought before a judge or appropriate court by a writ of habeas corpus. At common law and under the law of most states it would have been an abuse of the writ of habeas corpus to use it to consider questions of guilt or innocence, for the historical role of habeas corpus was simply to determine whether the arrest warrant was free from any formal defects and perhaps whether the warrant had been based on sufficient written evidence.¹²⁷ But a few states, apparently including Illinois, assigned a broader role to habeas corpus, as explained in this passage from a Philadelphia lawyer’s 1849 book on habeas corpus:

There is, however, an engraftment upon its use, as we derived this writ from the English law, which seems to have grown into strength in America, in some of the States by judicial decision, and in others by express statutory enactment, viz.: the hearing the whole merits and facts of the case upon habeas corpus, *deciding* upon the guilt or rather upon the *innocence* of the prisoner, and absolutely discharging him without the intervention of a jury, where the court is of opinion that the *facts* do not sustain the criminal charge.¹²⁸

In Illinois this approach was embodied in the statutory provision that permitted a petitioner for habeas corpus to “allege any facts to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge,” and empowered the court or judge to “proceed in a summary way to settle the said facts, by hearing the testimony . . . and dispose of the prisoners as the case may require.”¹²⁹ Under these provisions an Illinois prisoner who

¹²⁶ Ill. Rev. Stat. § 3, at 221 (1833).

¹²⁷ CHURCH, HABEAS CORPUS §§ 234–35 (1884); Oaks, *supra* note 106, at 258–60.

¹²⁸ INGERSOLL, HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS 39–40 (1849). A leading case under this approach is *Ex parte Mahone*, 30 Ala. 49 (1857), discussed in CHURCH, HABEAS CORPUS § 237 (1884): “the better rule is that before indictment the whole question of the prisoner’s guilt or innocence may be examined by the habeas corpus court.” A leading federal case where the writ was apparently used in this manner is *Ex parte Smith*, 22 Fed. Cas. 373 (No. 12968) (C.C.D. Ill. 1843), where Joseph Smith was freed from custody under an extradition warrant after a full hearing that included introduction of affidavits to show his innocence of the crime charged. This case is also discussed in 5 SMITH 209–45.

¹²⁹ Ill. Rev. Stat. § 3, at 324 (1833).

had been arrested under a warrant issued by a justice of the peace¹³⁰ could validly use a writ of habeas corpus to obtain a full judicial review of his case, including a hearing at which he could present witnesses or other evidence and a judicial determination of his guilt or innocence (to the limited extent of discharging him if he was clearly innocent, or holding him in custody or admitting him to bail if there was probable cause to believe that he had committed the charged offense). The Nauvoo Municipal Court may have erred in its application of these principles, and some of its members seem to have misapprehended the significance of the discharge — considering it a final adjudication of innocence that would preclude any further arrest or trial¹³¹ — but the power that the court exercised was clearly authorized by law, not in defiance of it.

The *Expositor's* charges about abuse of the writ of habeas corpus have provided the occasion for a discussion of the municipal court's use of this ancient and honored remedy. Because the subject has considerable interest for historians, the discussion has been more comprehensive than was necessary for the immediate purpose at hand. It is readily apparent that, even though the *Expositor's* charges of abuse of the writ were not well founded, the whole subject was well within the area of political controversy. There was nothing in the *Expositor's* political copy that gave the authorities of Nauvoo any legal basis whatever for the suppression of the newspaper.

2. *Religion.* The same can be said of the *Expositor's* charges that Joseph Smith was teaching false religious doctrines, notably polygamy. Since the Illinois Constitution provided that "no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship,"¹³² the teachings of religion could not properly be the concern of any civil authority. Consequently, the doctrinal controversy in the *Expositor* offered no conceivable basis for suppressionary action by city authorities.

3. *Morality.* Probably the most provocative portions of the *Expositor* were the claims that Hyrum Smith was a "base seducer, liar and perjurer" and the charges that Joseph Smith had spread "death, devastation and ruin," that he had committed fraud in handling Church monies, and that he was guilty of practicing whoredoms and had engaged in numerous seductions of the type vividly described, which were said to have caused the untimely death of the women involved.

Volumes have been written about the truth or falsity of these and similar charges relating to the character of the Mormon leaders.¹³³ For present pur-

¹³⁰ The habeas corpus review described in the text applied in the usual case where the arrest warrant had been issued by a judge or justice of the peace. Where the prisoner was "in custody by virtue of process from any court," on the other hand, a court could not review the evidence by means of a writ of habeas corpus, and could only discharge for certain enumerated causes related to a lack of jurisdiction in the issuing authority or formal defects in the process. Ill. Rev. Stat. § 3, at 324 (1833). The common law scope of review was similarly narrow where the prisoner was being restrained under the order of a superior court. *E.g.*, CHURCH, HABEAS CORPUS § 238 (1884).

¹³¹ See discussion in text following note 25 *supra*.

¹³² ILL. CONST. art. VIII, § 3 (1818).

¹³³ *E.g.*, BRODIE, NO MAN KNOWS MY HISTORY (1945); EVANS, JOSEPH SMITH — AN AMERICAN PROPHET (1933); O'DEA, THE MORMONS (1957).

poses it is unnecessary — even if it were possible — to resolve the conflicts between their detractors and defenders. Whether the charges were true or false, they were malicious, scandalous, and defamatory.¹³⁴ By the standards of that day the account of the young girl's seduction may have been obscene.¹³⁵ In view of the Mormons' undoubted affection for their leaders, the virulent attacks upon them had a tendency to provoke retaliatory mob action against the newspaper by the citizens of Nauvoo, as the councilmen observed in their deliberations. Finally, the councilmen also feared that the first and subsequent issues of the *Expositor* would arouse mobs of anti-Mormons to come to Nauvoo to drive out its citizens. Subsequent events, notably the mob murder of Joseph Smith and the eventual expulsion of the Mormons from Nauvoo by armed mobs, suggest that these fears were not groundless. Each of these aspects of the *Expositor's* charges was a legitimate concern of the city government, and a possible basis for its suppressionary action.

B. The Legality of the Suppression

Governor Ford and subsequent commentators have made three objections to the legality of the council's action in suppressing the *Expositor*. (1) The council had gone beyond its legislative powers of defining a nuisance by general ordinance and had entered upon the judicial prerogative of passing judgment on individual acts, all without notice, hearing, or trial by jury. (2) A newspaper, however scurrilous or libelous, cannot be legally abated or removed as a nuisance. (3) The council's action violated the state constitutional provision insuring the liberty of the press.¹³⁶ These points will be discussed in that order.

1. *The council's power to abate nuisances.* So far as municipal government law is concerned, Governor Ford's insistence that "the Constitution abhors and will not tolerate the union of legislative and judicial power in the same body of magistracy . . ." ¹³⁷ was totally without merit. The concept of separation of legislative, executive, and judicial authority, so vital in our federal government, has relatively little application at the municipal level. The blend of legislative and executive authority inherent in the mayor-council form of government was and is familiar. Less common, but by no means unique, was the combination of executive, legislative, and judicial powers established by the Illinois General Assembly in the Nauvoo Charter. The city council was composed of the mayor, four aldermen, and nine councilors.¹³⁸ This was the lawmaking body, whose legislative authority expressly included the power (invoked in the destruction

¹³⁴ Defamation, which includes libel and slander, consists of an attempt by words or pictures to blacken a person's reputation or to expose him to hatred, ridicule, or contempt. Truth may be a defense to an action for damages for defamation, but it does not make the words less defamatory. PROSSER, *TORTS* § 92, at 574, § 96, at 630 (2d ed. 1955).

¹³⁵ Obscenity is largely a matter of the conscience and opinion of the community at the time, and does not admit of any precise definition. SIEBERT, *THE RIGHTS AND PRIVILEGES OF THE PRESS* 235-40, 244-45 (1934), quotes several newspaper articles of a character similar to the *Expositor's*. Some were judged obscene; others were not.

¹³⁶ FORD, *HISTORY OF ILLINOIS* 325 (1854); 6 SMITH 534-35.

¹³⁷ 6 SMITH 535.

¹³⁸ Ill. Laws 1840, § 6, at 53. A complete copy of the Nauvoo Charter also appears in GREGG, *THE PROPHET OF PALMYRA* 463-71 (1890), and in 4 SMITH 239-48.

of the *Expositor*) "to make regulations to secure the general health of the inhabitats [*sic*], to declare what shall be a nuisance, and to prevent and remove the same."¹³⁹ The judicial authority was vested in the individuals who were mayor and aldermen. As a group they comprised the municipal court. In addition, the mayor had exclusive jurisdiction in all cases arising under city ordinances (with an appeal from his decision to the municipal court), and he, with the various aldermen, had all the powers of justices of the peace within the limits of the city, both in civil and in criminal cases arising under state law.¹⁴⁰

The traditional function of legislative power is to enact general legislation to define what constitutes a crime, leaving it to the judiciary to determine whether individual acts or conditions come within that definition.¹⁴¹ Therefore, Governor Ford criticized the Nauvoo City Council for assuming both legislative and judicial functions by declaring particular property to be a nuisance and simultaneously ordering its abatement without first laying the matter before a court. In his conference with the Governor in Carthage, Joseph Smith undertook to justify this action on the ground that the council represented both legislative and judicial powers:

I cannot see the distinction that you draw about the acts of the City Council, and what difference it could have made in point of fact, law, or justice, between the City Council's acting together or separate, or how much more legal it would have been for the Municipal Court, who were a part of the City Council, to act separate, instead of with the councilors.¹⁴²

There are two reasons why Joseph Smith's argument was not well founded and why the council's action cannot be justified on the basis of the judicial powers of some of its members. First, judicial power cannot be validly exercised without notice to interested parties and an opportunity for them to be heard. The owners and publishers of the *Expositor* were not given notice or hearing. Second, the Nauvoo Charter guaranteed "a right to a trial by a jury of twelve men in all cases before the municipal court,"¹⁴³ and there was, of course, no jury trial prior to the suppression.

Joseph Smith was on sounder ground in the original explanation he gave of the *Expositor* suppression as simply an exercise of the council's legislative authority to abate nuisances.¹⁴⁴ The destruction or removal (abatement) of nuisances was one of those classes of acts that the common law permitted without the interposition of judicial power. Blackstone, whose definitive work on the common law was studied by the councilors to determine the legality of

¹³⁹ Ill. Laws 1840, § 13, at 54-55, incorporating Ill. Laws 1839, art. 5, § 7, at 9.

¹⁴⁰ Ill. Laws 1840, §§ 16-17, at 55.

¹⁴¹ See, e.g., *Morison v. Rawlinson*, 193 S.C. 25, 33-34, 7 S.E.2d 635, 639 (1940). In an early Illinois case the city council proceeded in this conventional fashion, passing an ordinance declaring the sale of liquor to be a nuisance and then prosecuting the defendants in court when they violated the ordinance. *Goddard v. President of Jacksonville*, 15 Ill. 589 (1854).

¹⁴² 6 SMITH 584-85. This argument was echoed by John Taylor about ten years later. 7 *id.* at 121.

¹⁴³ Ill. Laws 1840, § 17, at 55.

¹⁴⁴ 6 SMITH 538.

their proposed action, states that certain nuisances may be abated by the aggrieved party without notice to the person who committed them.¹⁴⁵ The leading American case on summary abatement at this time was an 1832 decision by the highest court of the State of New York concerning the right of the city of Albany to pass an ordinance declaring a structure in its harbor to be a public nuisance and directing its officers to abate it by destruction (without any judicial proceedings).¹⁴⁶ The court held that the municipality's proposed action was a valid exercise of its common law powers and of the police power conferred by its statutory authority to abate nuisances, and that no judicial hearing was required. The court's conclusion on the latter point was as follows:

Much stress was laid by the counsel for the appellants upon the fact that the exercise of the right claimed by the respondents would result in the destruction of their property, without the benefit of a trial by jury, and that consequently the ordinance in question was a violation of the Constitution of [*sic*] the Bill of Rights. The same objection would apply to the dejection of every nuisance, yet nothing is clearer or better settled than the right to exercise this power in a summary manner, not only where the whole community is affected, but where a private individual alone is injured. It is a right necessary to the good order of society, and the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. 3 Black. Comm. 5.¹⁴⁷

The page in Blackstone's *Commentaries* cited by the New York court in the above passage is the very page that the Nauvoo City Council studied prior to its action and later gave in defense of the legality of its abatement ordinance.¹⁴⁸ It is interesting that this same passage of Blackstone and this same New York case were the principal authorities followed by the Illinois Supreme Court in 1881 in a nuisance-abatement case.¹⁴⁹ There the court held that a municipality's charter authority to abate nuisances permitted it to pass a valid ordinance ordering its marshal (without any judicial proceedings) to remove a roof

¹⁴⁵ Quoted in text accompanying note 155 *infra*.

¹⁴⁶ *Hart v. Mayor of Albany*, 9 Wend. 571 (N.Y. Ct. Err. 1832).

¹⁴⁷ *Id.* at 609-10.

¹⁴⁸ 6 SMITH 445, 467. The passage from Blackstone is quoted in the text accompanying note 155 *infra*. Joseph Smith later gave the Governor this explanation of the council's reasoning:

Upon investigating the matter, we found that our City Charter gave us power to remove all nuisances; and, furthermore, upon consulting Blackstone upon what might be considered a nuisance, that distinguished lawyer, who is considered authority, I believe, in all our courts, states, among other things, that a libelous and filthy press, may be considered a nuisance, and abated as such.

Here, then one of the most eminent English barristers, whose works are considered standard with us, declares that a libelous press may be considered a nuisance; and our own charter, given us by the legislature of this State, gives us the power to remove nuisances; and by ordering that press abated as a nuisance, we conceived that we were acting strictly in accordance with law. We made that order in our corporate capacity, and the City Marshal carried it out.

Id. at 581.

¹⁴⁹ *King v. Davenport*, 98 Ill. 305, 311 (1881).

that did not conform to fire regulations from a private home and destroy it, without any liability for damages. Similarly, in a later case the Illinois Supreme Court said that a municipality (whose charter powers to abate nuisances were practically identical to those of Nauvoo) could properly provide by ordinance that a certain house infected with smallpox germs be summarily abated by burning, if the circumstances were such that less drastic measures were not feasible.¹⁵⁰

From the authorities discussed above it appears that the first objection to the Nauvoo Council's action — that it wrongly failed to use or that it improperly exercised judicial powers — was without foundation. If the *Expositor* was a nuisance, and if it was the sort of nuisance that permitted summary abatement, the council's legislative powers sufficed to justify the action taken. These two qualifications will be discussed next.

2. *Abatement of newspaper as nuisance.* The common law defined a nuisance as any unreasonable, unwarranted, or unlawful use of property, or any improper, indecent, or unlawful personal conduct that produced material annoyance, inconvenience, discomfort, or injury to others or their property.¹⁵¹ Nuisances were private when they affected particular individuals, and public when their effect was general. Under this definition, if the *Expositor* was a nuisance at all it could have been classified as both a public and a private nuisance, since its libels not only injured private individuals but were also of such a scandalous and provocative character as to be of concern to the community at large. A party injured by a private nuisance could sue to obtain damages or to compel its removal. The commission of a public nuisance was punishable as a crime. In addition, in certain circumstances private individuals could abate private nuisances and private individuals or public officials could abate public nuisances.¹⁵²

Governor Ford charged that a scurrilous and libelous newspaper could not be legally abated or removed as a nuisance, and indeed that such a thing had never been thought of before in the United States.¹⁵³ It is not clear whether the Governor was correct that this was the first attempt in this country to abate a newspaper as a nuisance.¹⁵⁴ It is clear that it was not the last. In any event, in retrospect there seems to have been considerable basis from which a person acting in 1844 could have concluded that a publication devoted to malicious, scandalous, and defamatory matter likely to provoke mob action could be abated as a nuisance.

¹⁵⁰ *Sings v. City of Joliet*, 237 Ill. 300, 86 N.E. 663 (1908). The Nauvoo Charter provision on nuisance abatement is quoted in the text accompanying note 139 *supra*.

¹⁵¹ 1 WOOD, NUISANCES § 1 (3d ed. 1893).

¹⁵² 2 *id.* at 941-70.

¹⁵³ 6 SMITH 535-36.

¹⁵⁴ Joseph Smith replied to the Governor's claim as follows:

We refer your Excelency to Humphrey *versus* Press in Ohio, who abated the press by his own arm for libel, and the courts decided on prosecution no cause of action. And we do know that it is common for police in Boston, New York, etc., to destroy scurrilous prints: and we think the loss of character by libel and the loss of life by mobocratic prints to be a greater loss than a little property . . .

Id. at 539. I have been unable to locate the *Humphrey* case among the reported decisions of the Ohio appellate courts.

The passage of Blackstone's *Commentaries* referred to by the Nauvoo city councilors in their deliberations on what measures should be taken against the *Expositor* reads as follows:

A fourth species of remedy by the mere act of the party injured, is the *abatement*, or removal of *nuisances* (6) . . . [W]hatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. . . . And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind [the examples just given were interference with ancient lights or erection of gate across public highway], which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

(6) . . . As to private nuisances, they also may be abated So it seems that a libellous print or paper, affecting a private individual, may be destroyed, or, which is the safer course, taken and delivered to a magistrate. 5 Coke, 125, b. 2 Camp. 511.¹⁵⁵

The basis for the statement in footnote six — the passage specifically relied on by the councilors¹⁵⁶ — is the classification as a private or public nuisance of whatsoever has a deleterious influence upon the morals, good order, or well being of society. For example, in a case decided in 1854 the Illinois Supreme Court gave its opinion that obscene books, prints, and pictures could be categorized as a public nuisance because they were hurtful and injurious to the public morals, good order, and well being of society.¹⁵⁷ Similar reasoning was employed by Illinois and her sister states in contemporary decisions classifying as nuisances (and requiring abatement of or imposing punishments for) obscene books and prints; scandalous, profane, and obscene language in public; disorderly houses; and other immoral, indecent, and unlawful public acts.¹⁵⁸ Research has not disclosed any attempts to use the nuisance principles to

¹⁵⁵ 2 BLACKSTONE, COMMENTARIES 4-5 & n.6 (Am. ed. from 18th Eng. ed. 1832). The citation given in the synopsis of the council proceedings, 6 SMITH 445, does not give the edition used, but the volume and page numbers are the same as for the American edition just cited. Like most contemporary editions of Blackstone, this 1832 American edition published Blackstone's original four books in two volumes, but it also carried the pagination of the original books in brackets. An 1826 London edition by Joseph Chitty appeared in four volumes, however, and this may have been the source referred to by Joseph Smith in his letter to Governor Ford: "See Chitty's Blackstone Bk. iii: v, and n., &c., &c." 6 SMITH 467. Alternatively, he may have been referring to the original pagination in the American edition, of which Chitty was one of four editors. The material in 3 BLACKSTONE, COMMENTARIES 5-6 & n.6 (Chitty ed. 1826), and the material in the original edition, are identical with that quoted in the above text and cited at the beginning of this note.

¹⁵⁶ 6 SMITH 445, 538, 581; see note 148 *supra*.

¹⁵⁷ See *Goddard v. President of Jacksonville*, 15 Ill. 589, 594 (1854); 2 RUSSELL, CRIMES 1731 (8th ed. 1923).

¹⁵⁸ *City of Chicago v. Shaynin*, 258 Ill. 69, 101 N.E. 224 (1913); *Oehler v. Levy*, 234 Ill. 595, 85 N.E. 271 (1908); *State v. Bertheol*, 6 Ind. 474 (1843); *Commonwealth v. Oaks*, 113 Mass. 8 (1873); *Commonwealth v. Holmes*, 17 Mass. 335 (1821); *Commonwealth v. Sharpless*, 2 Pa. 91 (1815); *State v. Graham*, 35 Tenn. 134 (1855); *Nolin v. Mayor & Aldermen*, 12 Tenn. 163 (1833).

suppress defamatory, obscene, or mob-inciting newspapers prior to 1844, but there is a history of such attempts after that date.¹⁵⁹

On the question whether the type of publications described above constituted the sort of nuisance that could be abated summarily (without judicial hearing), there was little or no published judicial opinion in the 1840's. Subsequent cases and commentators, however, have laid down principles that could be used to sustain a certain limited degree of summary abatement in such circumstances. Thus, in 1920 the Illinois Supreme Court quoted approvingly this statement by a noted expert on the police power:

Where the condition of a thing is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is *incapable of being put to any lawful use by the owner*, it may be treated as a nuisance per se. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued.¹⁶⁰

Subsequent discussion will demonstrate how the emphasized words require a distinction between the legality of the destruction of the issues of the newspaper on one hand and the printing press on the other.

The foregoing authorities suggest three bases for the characterization of the *Expositor* and its individual issues as a nuisance. The safety and good order of the community were threatened by the *Expositor*: (1) because the reaction of an outraged citizenry threatened the annihilation of the newspaper and perhaps the injury of its publishers by mob action in the city, (2) because its continuance might incite mob action by anti-Mormons in the surrounding areas against the city and its inhabitants; and (3) because of their scurrilous, defamatory, and perhaps obscene character, the individual newspapers were offensive to public morals. In view of the law discussed above, particularly the statement in Blackstone, the combination of these three considerations seems to have been sufficient to give the Nauvoo City Council considerable basis in the law of their day for their action in characterizing *the published issues* of the *Nauvoo Expositor* as a nuisance and in summarily abating them by destruction.

The characterization of the printing press as a nuisance, and its subsequent destruction, is another matter. The common law authorities on nuisance abatement generally, and especially those on summary abatement, were emphatic in declaring that abatement must be limited by the necessities of the case, and that no wanton or unnecessary destruction of property could be permitted. A party guilty of excess was liable in damages for trespass to the party injured. This principle was illustrated by Indiana and Illinois courts shortly after the *Expositor* affair. In an Indiana case in 1846 the owner of a bowling alley was convicted of keeping a public nuisance, a disorderly bowling alley. The trial judge fined the individual and ordered the sheriff to "remove and abate the nuisance, to wit, the ball alley."¹⁶¹ The Indiana Supreme Court affirmed the

¹⁵⁹ See examples cited in notes 196 and 205 *infra* and accompanying text.

¹⁶⁰ *People v. Marquis*, 291 Ill. 121, 129, 125 N.E. 757, 760 (1919), quoting FREUND, *POLICE POWER* § 520 (1904). (Emphasis added.) See 2 WOOD, *NUISANCES* 1282-83 n.4 (3d ed. 1893).

¹⁶¹ *Bloomhoof v. State*, 8 Ind. 205 (1846).

judgment imposing the fine, but reversed the order for abatement. Neither the ball alley nor the room in which it was kept was a nuisance, the court observed. "The nuisance was in the manner in which they were kept."¹⁶²

In a leading Illinois case decided somewhat later, the Illinois Supreme Court rendered an opinion to the same effect.¹⁶³ This was an action for damages for trespass against a worthy citizen who had broken into a saloon, smashed glasses, boxes, and beer kegs, and had torn down the building on the pretext of abating a public nuisance. The court affirmed the saloon keeper's right to recover damages from the intruder. Even if the house were a public nuisance, the court said, "neither the common law nor the statute has authorized individuals or communities to tear down and destroy the buildings in which such unlawful business is pursued, nor does either permit the courts, on conviction, to have such buildings destroyed or abated."¹⁶⁴ This was not the sort of nuisance that could be abated by private parties, the court concluded, and, in any event, the nuisance was not the property destroyed but the manner in which it was used.

The principle applied in these cases was that set forth in Blackstone's discussion of nuisances, which the council studied and used as authority for its abatement ordinance.¹⁶⁵ The very passage relied on by the council made this distinction for, as pointed out by B. H. Roberts, "the destruction of libelous '*prints and papers*' can scarcely be held to sustain the action of destroying a '*printing press*.'"¹⁶⁶

These cases make clear that there was no legal justification in 1844 for the destruction of the *Expositor* press as a nuisance. Its libelous, provocative, and perhaps obscene output may well have been a public and a private nuisance, but the evil article was not the press itself but the way in which it was being used. Consequently, those who caused or accomplished its destruction were liable for money damages in an action of trespass.¹⁶⁷

3. *Constitutional guarantee of free press.* It was not the destruction of private property without compensation that caused Joseph Smith and his associates to be condemned for the *Expositor* affair. The principal complaint would have been the same if the council had silenced the paper by a court order, by jailing the editor, or by padlocking the premises. The most important legal aspect of the *Expositor* suppression — the one that served to enrage public opinion, disenchant sympathetic historians, and offend the sensibilities of modern students — is the charge that the action violated the freedom of the press.

The major modern bulwark of the free press, the first amendment to the United States Constitution, had no application to the suppression of the *Nau-*

¹⁶² *Id.* at 206.

¹⁶³ *Earp v. Lee*, 71 Ill. 193 (1873).

¹⁶⁴ *Id.* at 195; *cf.* *City of Chicago v. Union Stock-Yards & Transit Co.*, 164 Ill. 224, 45 N.E. 430 (1896).

¹⁶⁵ Blackstone's discussion is quoted in text accompanying note 155 *supra*.

¹⁶⁶ 7 SMITH 91 n.

¹⁶⁷ Joseph Smith's communications with Governor Ford show his awareness of the possibility of such liability and express his willingness to abide by the decisions of the courts in the matter. 6 *id.* at 538, 585.

voe Expositor. By its terms the first amendment only restricts the action of the federal government, and it was not until long after the fourteenth amendment was adopted in 1868 that the free-press guarantees became applicable to the agencies of state authority.¹⁶⁸ Therefore, the only constitutional free-press guarantees relevant to the *Expositor* suppression are those that were embodied in the Illinois Constitution.

The pertinent provision of the Illinois Constitution of 1818, then in effect, was section 22 of the Declaration of Rights:

The printing presses shall be free to every person, who undertakes to examine the proceedings of the General Assembly or of any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.¹⁶⁹

The constitutional status of the abatement of the *Expositor* as a nuisance depends on the meaning to be drawn from these words in 1844. Since the Illinois Supreme Court had given no opinion on the meaning of the above provision by 1844, it is necessary to examine the history of the free-press guarantees and the meaning ascribed to comparable language in neighboring states.¹⁷⁰

The following discussion is indebted to Leonard W. Levy, whose illuminating *Legacy of Suppression* has demonstrated that "the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics."¹⁷¹ The men who prepared, ratified, and sat as judges to construe the state constitutions discussed here were products of that same tradition. In attempting to ascertain the meaning of the Illinois free-press guarantee in 1844 we should look to the intentions and temper of their generation and not to the broader freedoms of our own day.

Although the Illinois free-press provision seems to have been copied from the guarantees previously adopted by Kentucky, Ohio, and Indiana,¹⁷² this particular phraseology was apparently first used in the Pennsylvania Constitution of 1790.¹⁷³ Because there seems to have been no early interpretive litigation,

¹⁶⁸ *E.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931). In a letter to Abigail Adams, dated Sept. 11, 1804, Thomas Jefferson wrote, "While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so." *Dennis v. United States*, 341 U.S. 494, 522 (1951).

¹⁶⁹ ILL. CONST. art VIII, § 22 (1818), reprinted in Ill. Rev. Stat. at 46 (1833).

¹⁷⁰ See generally DUNIWAY, *THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS*, 141 (Harvard Historical Studies No. 12, 1906); SCHOFIELD, *ESSAYS ON CONSTITUTIONAL LAW AND EQUITY* 510-71 (1921); Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

¹⁷¹ LEVY, *Preface to LEGACY OF SUPPRESSION* at vii (1960).

¹⁷² ANTHONY, *THE CONSTITUTIONAL HISTORY OF ILLINOIS* 39 (1891). There were substantially identical provisions in IND. CONST. art. I, § 9 (1816); KY. CONST. art. X, § 7 (1799); OHIO CONST. art. VIII, § 6 (1802).

¹⁷³ PA. CONST. art. IX, § 7 (1790), reprinted in PURDON, *DIGEST OF PENNSYLVANIA LAW* 31 (10th ed. Brightly 1873).

tion in any of the first three states, the meaning that the Pennsylvania courts read into this provision is, therefore, of the greatest significance.

The first judicial opinion on the meaning of the general phrases later embodied in the Illinois Constitution came in a 1788 Pennsylvania case, which held that they simply meant that every citizen had a right to investigate the conduct of public officials "and they effectually preclude any attempt to fetter the press by the institution of a *licenser*."¹⁷⁴ This view that the great general guarantees of a free press were simply a precaution against reinstitution of the historic prior restraints or censorship on publication was reiterated by James Wilson, a renowned lawyer and Justice of the United States Supreme Court, who drafted the 1790 Pennsylvania Constitution.

[W]hat is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.¹⁷⁵

The Illinois Constitution also said that the editor should be "responsible for the abuse of that liberty." The usual form of responsibility was a civil action for damages or a state prosecution for criminal libel, particularly seditious libel, which consisted broadly of criticism of the form, officers, or acts of government. Such prosecutions were relatively common, especially at the turn of the 19th century.¹⁷⁶ The temper of the times is revealed by an 1805 Pennsylvania case. The defendant was indicted for seditious libel for statements in a weekly paper that were alleged to have been intended to bring the independence of the United States and the constitution of Pennsylvania into hatred and contempt, to excite popular discontent against the government, and to scandalize the characters of revolutionary patriots and statesmen. When the defendant urged the constitutional freedom of the press in defense, the Pennsylvania court gave this exposition of the meaning of the constitutional provision that was the prototype of the Illinois free-press guarantee:

There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to *private* men, affected by injurious publications, unless the discussion be *proper for public information*. But "If one uses the weapon of truth wantonly, for disturbing the peace of families, he is guilty of a libel." Per general *Hamilton* in *Crosswell's* trial, pa. 70. The matter published is not proper for public information. *The common weal is not interested in such a communication except to suppress it.*¹⁷⁷

¹⁷⁴ *Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788). This case concerned the meaning of provisions in the Pennsylvania Constitution of 1776 which declared "that the freedom of the press shall not be restrained" and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government." *Ibid*.

¹⁷⁵ LEVY, *LEGACY OF SUPPRESSION* 201-02 (1960). (Emphasis omitted.)

¹⁷⁶ *Id.* at 176-309.

¹⁷⁷ *Respublica v. Dennie*, 4 Yeates 267, 269-70 (Pa. 1805). (Emphasis added.)

The only other major source of judicial opinion on state free-press guarantees prior to 1844 was in Massachusetts, whose highest court in a notable 1838 decision gave substantially the same interpretation of the free-press guarantee as that issued earlier in Pennsylvania.¹⁷⁸ After examining the effect of this and similar decisions one authority concluded:

In Massachusetts, as in other American states and in the British Empire, the courts long continued to maintain practical restrictions upon freedom of the press in the spirit of a system of law which recognized no affirmative right of freedom of discussion, but which sought primarily to preserve the peace and to protect the government and the reputation of the individual from injurious public criticism.¹⁷⁹

The cases decided before 1844 do not provide a definitive answer to the question whether the Illinois free-press guarantee would have permitted an agency of the state to use its nuisance-abatement powers to suppress a newspaper which was publishing material that offended the public's sense of decency or threatened the public peace or welfare. They do hold that the only purpose of the general free-press language was to prevent formal prior restraints upon publication, such as licensing and censorship — an interpretation that was generally accepted for over a hundred years.¹⁸⁰ They also show great judicial sympathy for stern repressive measures in the enforcement of the criminal libel and civil damage laws against newspaper editors who abused their privileges. Finally, the courts' references to "suppression" and suppressionist sentiments voiced by some of the founding fathers¹⁸¹ reveal that damage actions or criminal prosecutions may not have been the only types of "responsibility" considered appropriate for abuse of the liberty. While there is no proof that any of these sources were studied and relied upon by the Nauvoo City

¹⁷⁸ In upholding the conviction of a newspaper for blasphemous libel Chief Justice Shaw explained that the intention of the free-press article was

to insure the general right of publication, at the same time leaving every citizen responsible for any offence capable of being committed by the use of language, as well when printed, as when oral, or in manuscript. Any other construction of the article would be absurd and impracticable, and inconsistent with the peace and safety of the State, and with the existence of free government.

Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 219 (1838); *accord*, *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 15 Am. Dec. 214 (1825); *Commonwealth v. Whitmarsh, Thacher*, Cr. Cas. 441 (Boston Munic. Ct. 1836).

¹⁷⁹ DUNIWAY, *op. cit. supra* note 170, at 157.

¹⁸⁰ BEMAN, CENSORSHIP OF SPEECH AND THE PRESS 208-09 (1930); 2 COOLEY, CONSTITUTIONAL LIMITATIONS 883 (8th ed. Carrington 1927); Vance, *Freedom of Speech and of the Press*, 2 MINN. L. REV. 239, 248 (1918); see also text accompanying note 214 *infra*.

¹⁸¹ Thomas Jefferson, who is renowned as an advocate of a free press, wrote in 1807: "It is a melancholy truth . . . that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper." LEVY, JEFFERSON AND CIVIL LIBERTIES 48 (1963); see also note 168 *supra*. Another signer of the Declaration of Independence concluded in 1776 that a council of safety would be justified on the plain principles of self-preservation in "silencing a press, whose weekly productions insult the feelings of the people, and are so openly inimical to the American cause." LEVY, LEGACY OF SUPPRESSION 180-81 (1960). Benjamin Franklin, writing in 1789 of antigovernment writers, declared that "we should, in moderation, content ourselves with tarring and feathering and tossing them in a blanket." *Id.* at 187. For accounts of mob violence against presses and publishers during the Revolutionary period see *id.* at 177-79.

Council, the source on which they did rely, Blackstone's *Commentaries*, is the leading authority to the effect that the liberty of the press consists merely "in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."¹⁸²

As Levy has demonstrated, the generation that gave birth to the constitutional phrases that guarantee a free press, also, by their actions, bequeathed a legacy of suppression. Although the succeeding century was relatively free from litigation interpreting the free-press guarantees, the available evidence demonstrates that the 19th-century interpretation of constitutional provisions like that of Illinois laid far more emphasis on the "responsibility" of the press than on its "freedom."

The suppressionist attitude made itself felt in numerous criminal prosecutions against newspaper writers, editors, and publishers for various types of newspaper activity like the *Expositor's*.¹⁸³ One type of statute used in such prosecutions made it a crime to publish a newspaper that was devoted largely to the publication of "criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime"¹⁸⁴ or "scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons."¹⁸⁵ Apparently without exception such statutes were sustained against the contention that they offended the freedom of the press.

Although prosecutions for seditious libel fell into disuse soon after 1800,¹⁸⁶ Illinois and other states continued to punish as criminal the utterance or publication of words that tended to incite violent overthrow of the government, provoke a riot, or induce a breach of the peace.¹⁸⁷ Claims that these statutes were forbidden by the constitutional free-press guarantees were uniformly rejected.

The foregoing discussion shows that the Illinois free-press guarantees would not have been an obstacle if the Nauvoo authorities had brought criminal

¹⁸² 2 BLACKSTONE, COMMENTARIES 113 (Am. ed. from 18th Eng. ed. 1832). A pamphleteer who wrote in 1799 said that this Blackstone definition meant that "a man might be jailed or even put to death for what he published provided that no notice was taken of him before he published." LEVY, JEFFERSON AND CIVIL LIBERTIES 51 (1963) (apparently paraphrasing rather than quoting a pamphlet by George Hay).

¹⁸³ E.g., *People v. Fuller*, 238 Ill. 116, 87 N.E. 336 (1909); *Clay v. People*, 86 Ill. 147 (1877); *Hartford v. State*, 96 Ind. 461 (1884); *Commonwealth v. Chapman*, 54 Mass. (13 Met.) 68 (1847); *State v. Burnham*, 9 N.H. 34 (1837); *Morton v. State*, 3 Tex. Ct. App. R. 510 (1878).

¹⁸⁴ *Strohm v. People*, 160 Ill. 582, 583, 43 N.E. 622 (1896); see *State v. McKee*, 73 Conn. 18, 25, 46 Atl. 409, 412 (1900).

¹⁸⁵ See *In re Banks*, 56 Kan. 242, 243, 42 Pac. 693, 694 (1895); *State v. Van Wye*, 136 Mo. 227, 37 S.W. 938 (1896).

¹⁸⁶ Kelly, *supra* note 170, at 315-16. See also *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923); COOLEY, *op. cit. supra* note 180, at 898-904. Although the issue was never tested in court, succeeding generations have generally assumed that the Federal Seditious Act was unconstitutional. E.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁸⁷ *People v. Beauharnais*, 408 Ill. 512, 97 N.E.2d 343 (1951), *aff'd*, 343 U.S. 250 (1952); *City of Chicago v. Terminello*, 400 Ill. 23, 79 N.E.2d 39 (1948), *rev'd on other grounds*, 337 U.S. 1 (1949); *Spies v. People*, 122 Ill. 1, 12 N.E. 865, *petition for writ of error dismissed*, 123 U.S. 131 (1887); *People v. Most*, 171 N.Y. 423, 64 N.E. 175 (1902). The leading decision of the first- and fourteenth-amendment standards governing the constitutionality of state criminal libel legislation, decided after the above text was written, is *Garrison v. Louisiana*, 379 U.S. 64 (1964).

prosecutions against the *Expositor* publishers for an abuse of the liberty of the press. A prosecution for criminal libel for the attacks on the city officials or a prosecution for unlawful assembly for the paper's efforts to incite violence would both have been feasible under Illinois laws then in effect.¹⁸⁸ The arrest and jailing of the editor and publishers might have stilled the *Expositor*. The same effect might also have been produced by suing these parties for damages for libel, obtaining judgment, and then satisfying the judgment by levying upon and selling the press. A third alternative, a suit for an injunction¹⁸⁹ against the publication of the newspaper, was not feasible as a practical matter, but it can be argued that even this restraint would not have offended the constitution. Although not as well settled then as it has become today, the rule that a court of equity will not enjoin defamatory material¹⁹⁰ would probably have prevented injunctive relief on the ground of defamation. But if the Nauvoo authorities could have convinced the circuit court (which had equity powers) that the newspaper was really inciting a riot, an injunction might have issued against what Justice Oliver Wendell Holmes later described as "words that may have all the effect of force."¹⁹¹ Finally, later judicial authority suggests that there was no constitutional obstacle in 1844 to the obtaining of an injunction to prevent further publication of a newspaper that had been found to be a public nuisance.¹⁹²

There are two legal distinctions between these alternative methods of squelching the *Expositor* and the method (abatement by destruction) used by the council. First, it can be argued that the destruction of the press was a prior restraint with respect to later issues of the *Expositor*, and, therefore, illegal under the predominant purpose of the free-press provision. Although admittedly forceful, this argument falls short of being conclusive, for the free-press provision can be read to prohibit only licensing measures that allow the state to prevent *initial* publication of the writer's efforts. It may not have been meant to prohibit subsequent suppression as one of the ways in which the editor

¹⁸⁸ A libel is a malicious defamation, expressed either by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule: Every person, whether writer or publisher, convicted of this offence, shall be fined in a sum not exceeding five hundred dollars, or imprisoned, not exceeding one year. . . .

Ill. Rev. Stat. § 120, at 172 (1833).

If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assemblage, and upon conviction thereof, be severally fined in a sum, not exceeding fifty dollars, or imprisoned not exceeding three months.

Ill. Rev. Stat. § 115, at 196 (1833).

¹⁸⁹ An injunction is a process by which a court orders (enjoins) a person not to do or to cease doing an act.

¹⁹⁰ E.g., *Montgomery Ward & Co. v. United Retail Employees Union*, 400 Ill. 38, 79 N.E.2d 46 (1948); *Dopp v. Doll*, 13 Ohio Law Bul. 335 (1885).

¹⁹¹ See *Schenck v. United States*, 249 U.S. 47, 52 (1919), citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911), quoted with approval in *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

¹⁹² See discussion in text following note 202 *infra*.

was "responsible" for the abuse of that liberty. As will be discussed hereafter, a unanimous state supreme court and four United States Supreme Court Justices have issued opinions to this effect in our own day. The constitutional provision clearly did not prevent criminal punishment, or civil attachment, even though either of these remedies could easily suppress subsequent writings. In addition, injunctions against incitements to riot or against obscene publications are an avowed prior restraint as to subsequent activities, and yet it has been suggested by high authority that this type of relief would not offend the free-speech provision.¹⁹³ In numerous other instances legislative bodies have imposed, and courts have approved, restraints prior to publication.¹⁹⁴ With the exception of avowed licensing measures, the prohibition against prior restraints, it seems, was relative and not absolute, and it is by no means obvious that the "prior restraint" rationale forbade what was done at Nauvoo.

Second, in a criminal prosecution or in a civil action for damages or an injunction, there is an interposition of judicial power between the party who desires to stop the newspaper and the application of the force that brings about that result. There was no such use of judicial power at Nauvoo. This is an important distinction to a people who believe in a rule of law. Nevertheless, there are circumstances in which the use of private property can be curtailed, forbidden, or, where necessary, even destroyed by the government or by private individuals without invoking judicial power. The summary abatement of nuisances, the theory on which the council proceeded, is one such example.

The action of the Nauvoo City Council in suppressing an opposition newspaper may have been the earliest example of official action of this type (in a day when mobs were not infrequently employed for the same purpose), but subsequent history shows that such official acts of suppression were not unique.

In 1863 General Burnside proclaimed the suppression of the *Chicago Times* and the *Jonesboro Gazette* "on account of the repeated expression of disloyal and incendiary statements," and took possession of the *Times* printing office with troops. Publication was resumed four days later when public pressure induced Lincoln to rescind the order, so the action was never tested in court.¹⁹⁵

In 1893 the city council of Seguin, Texas, passed an ordinance declaring that the *Chicago Sunday Sun* — a paper notoriously preoccupied with crime and immorality — was a public nuisance and prohibiting its circulation within the city limits. A county judge sustained the constitutionality of this measure, but a Texas appellate court held it in violation of the state free-press guarantee.¹⁹⁶

In 1918 the cities of Mount Vernon, New York, and North Bergen, New Jersey, passed ordinances forbidding the circulation within the city limits of newspapers published in the German language. North Bergen gave the prevention of riot in the township as its justification. The Mount Vernon ordi-

¹⁹³ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (dictum).

¹⁹⁴ See Note, *Previous Restraints Upon Freedom of Speech*, 31 COLUM. L. REV. 1148, 1151-55 (1931).

¹⁹⁵ 3 COLE, *THE CENTENNIAL HISTORY OF ILLINOIS* 303-04 (1919).

¹⁹⁶ *Ex parte Neill*, 32 Tex. Crim. 275, 22 S.W. 923 (1893).

nance demonstrated its purpose by also banning the *New York American* and the *New York Evening Journal*, two English-language publications which the council classified as harmful to the best interest of this nation in the prosecution of the war. The first court to examine these ordinances refused to give the newspapers any relief, relying on the rule that equity will not enjoin enforcement of the criminal law.¹⁹⁷ Subsequent courts struck down the ordinances as unconstitutional infringements of the free press.¹⁹⁸ The Mount Vernon City Council thereupon passed an ordinance requiring firms to obtain a license before circulating newspapers within the city limits, and reserved to themselves, in effect, the power to refuse licenses at their discretion. This ordinance, too, was held violative of the New York free-press guarantee.¹⁹⁹

A different form of restraint was attempted by Cleveland city officials in 1921. Charging that the weekly *Dearborn Independent* was calculated to excite scandal and had a tendency to create breaches of the peace, they had various newspaper vendors arrested for violation of Cleveland's ordinance forbidding the sale of indecent, obscene, and scandalous publications. A federal judge later found that the publication was not indecent, obscene, or scandalous, and that its sale upon the streets had been prevented solely because of its anti-semitism, which had no tendency to produce a breach of the peace. The city officials were enjoined from continuing this unconstitutional attempt to impose advance censorship of the contents of the newspaper.²⁰⁰

In 1908 Kingston, New York, had a newspaper which consisted primarily of reckless and scurrilous attacks upon the public and private lives of some of the citizens of that city. As a result of a mass meeting of citizens, some of whom later swore that this newspaper "injuriously affected the moral tone of large numbers of the community," police officers of the city of Kingston, under orders from their superiors, entered the newspaper building and seized and carried away 3700 copies of the newspaper intended to be circulated the following day. Holding that this action violated the New York Constitution's free-press guarantee (similar to Illinois'), a judge enjoined the police from further conduct of this sort.²⁰¹ The judge concluded that when the constitution said that the press should be "responsible for the abuse of its liberty" it did not mean that, when an official thought that a newspaper had abused its liberty, he could have it summarily suppressed. This opinion is unquestionably correct by today's standards, but it is revealing that the judge reached this conclusion purely by assertion and without citation of any previous judicial authority to support it.

Since government officials are presumably advised by competent lawyers on the legality of their actions, the foregoing list of efforts to suppress obnoxious

¹⁹⁷ *Star Co. v. Brush*, 172 N.Y. Supp. 661 (Sup. Ct.), *rev'd*, 185 App. Div. 261, 172 N.Y. Supp. 851 (1918).

¹⁹⁸ See *New Yorker Staats-Zeitung v. Nolan*, 89 N.J. Eq. 387, 105 Atl. 72 (Ch. 1918); *New Yorker Staats-Zeitung v. Brush*, 170 N.Y. Supp. 993 (Sup. Ct. 1918); *German Herold Publishing Co. v. Brush*, 170 N.Y. Supp. 993 (Sup. Ct. 1918).

¹⁹⁹ *Star Co. v. Brush*, 104 Misc. 404, 172 N.Y. Supp. 320 (Sup. Ct. 1918).

²⁰⁰ *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 480 (N.D. Ohio 1921).

²⁰¹ *Ulster Square Dealer v. Fowler*, 58 Misc. 325, 326, 111 N.Y. Supp. 16, 17 (Sup. Ct. 1908).

presses has some bearing on the reasonableness of the Nauvoo action for its time. Most persuasive on this issue, however, is the final case, the ultimate outcome and legal significance of which are familiar to every student of constitutional law, and perhaps to all persons who have concern for the precious freedoms of speech and press. Less well known are its early history and facts, which have a remarkable similarity to the suppression of the *Nauvoo Expositor*.

In September 1927, a weekly newspaper, the *Saturday Press*, was established in Minneapolis by Howard A. Guilford and J. M. Near. Its avowed mission was to furnish an exposé "of conditions AS THEY ARE in this city. . . ." ²⁰² The various issues of the newspaper charged in brutally frank language that the *Twin City Reporter* and various city officials were in league with or part of the gangsters who controlled gambling, bootlegging, and racketeering in Minneapolis. The *Press* linked them with various instances of blackmail, murder, and assault. The police chief was attacked for graft, neglect of duty, and companionship with gangsters; the county attorney was accused of failure to take corrective measures against known centers of vice; the mayor was castigated for inefficiency and dereliction of duty. ²⁰³ In later issues the paper was heavily antisemitic. ²⁰⁴

Minnesota at this time had a unique statute providing that any person who was engaging in publishing or circulating a malicious, scandalous and defamatory newspaper was guilty of a nuisance and could be enjoined. ²⁰⁵ On Novem-

²⁰² Record, p. 15, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) [hereinafter cited as Record].

²⁰³ Following are samples:

Our attack last week was aimed at but two targets: The gambling syndicate . . . and the *Twin City Reporter*, BOTH OWNED IN WHOLE OR IN PART BY J. D. BEVANS AND ED MORGAN . . .

[The men who shot Howard A. Guilford] HAD NO FEAR OF THE MINNEAPOLIS POLICE DEPARTMENT! Doubtless they were told that their case could be "fixed" if the shooting were to take place inside the city limits.

. . . .

The *Saturday Press* was informed BEFORE THE FIRST ISSUE, that the "City Hall" was receiving twenty-five per cent of the profits from the gambling joint owned and operated by the *Twin City Reporter*, Moe Barnett and "Red" Clare!

Record, pp. 57-58, 96.

²⁰⁴ There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW-GANGSTERS, therefore we HAVE Jew Gangsters practically ruling Minneapolis. . . . It is Jew thugs who have "pulled" practically every robbery in this city. . . . It was a gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. . . . Practically every vendor of vile hooch, every owner of moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW.

Id. at 322-23.

²⁰⁵ Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating . . .

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

Minn. Laws 1925, ch. 285, § 1, at 358.

ber 21, two days after the ninth issue of the *Saturday Press*, the county attorney filed a complaint under the above statute alleging that the *Saturday Press* was largely devoted to malicious, scandalous, and defamatory articles and asking for an injunction to abate the nuisance.²⁰⁶ The trial judge promptly issued an order restraining Guilford and Near from any further circulation of existing issues and from producing or publishing any further issues of the *Saturday Press*.²⁰⁷ Two weeks later the judge issued an opinion upholding the constitutionality of the Minnesota legislation and denying defendants' motion to dismiss the action.²⁰⁸ Later, after a consideration of the evidence, the judge reaffirmed this conclusion and entered an order that the nuisance be abated and that defendants Guilford and Near be permanently enjoined from further publication or sale of the *Saturday Press* or any other malicious, scandalous, or defamatory newspaper.²⁰⁹

Twice this case was appealed to the Minnesota Supreme Court, and twice that court — without dissenting voice — affirmed the trial judge, holding that the suppressive action did not offend the constitutional guarantee of a free press.²¹⁰

First, the Minnesota Supreme Court concluded that a newspaper which exhibited "a continued and habitual indulgence in malice, scandal, and defamation" could validly be characterized as a nuisance within the meaning of the statute "since it annoys, injures, and endangers the comfort and repose of a considerable number of persons" ²¹¹ Second, the court ruled that, in declaring such a business to be a public nuisance, the statute was a legitimate exercise of the police power of the state:

The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime.²¹²

Finally, the court ruled that the action taken did not offend the liberty of the press guaranteed by the Minnesota Constitution (a provision similar to Illinois'),²¹³ which simply "meant the abolition of censorship and that governmental permission or license was not to be required. . . ." ²¹⁴ The court's opinion on what the freedom of the press did mean is worth reproducing at length.

In making the publisher responsible for the abuse of the press the legislature is authorized to make laws to bridle the appetites of those who thrive upon scandal and rejoice in its consequence.

²⁰⁶ Record, pp. 4, 7.

²⁰⁷ *Id.* at 1.

²⁰⁸ *Id.* at 336.

²⁰⁹ *Id.* at 360.

²¹⁰ *State v. Guilford*, 174 Minn. 457, 219 N.W. 770 (1928), *aff'd*, 179 Minn. 40, 228 N.W. 326 (1929), *rev'd sub nom. Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

²¹¹ *Id.* at 459, 219 N.W. at 771.

²¹² *Id.* at 461-62, 219 N.W. at 772.

²¹³ "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. 1, § 3.

²¹⁴ 174 Minn. at 462, 219 N.W. at 772.

It was never the intention of the Constitution to afford protection to a publication devoted to scandal and defamation. He who uses the press is responsible for its abuse. . . . It is the liberty of the press that is guaranteed — not the licentiousness. The press can be free and men can freely speak and write without indulging in malice, scandal, and defamation; and the great privilege of such liberty was never intended as a refuge for the defamer and the scandalmonger. Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous, and defamatory printed matter. Obviously, indulgence in such publications would soon deprave the moral taste of society and render it miserable. A business that depends largely for its success upon malice, scandal, and defamation can be of no real service to society.

It is not a violation of the liberty of the press or of the freedom of speech for the Legislature to provide a remedy for their abuse. . . . Indeed, the police power of the state includes the right to destroy or abate a public nuisance. Property so destroyed is not taken for public use, and therefore there is no obligation to make compensation for such taking. 6 R.C.L. 480, §478. The rights of private property are subservient to the public right to be free from nuisances which may be abated without compensation. 12 C.J. 1279, §1085. The statute involved does not violate the due process of law guarantee. . . .

In equitable actions of this character the defendants are not entitled to a jury trial. . . . As indicated, this kind of an action involves more than a mere libel. The purpose of this statute is to repress the nuisance by a direct attack upon the property involved. It inflicts no personal penalties as punishments for evils involved.²¹⁵

Although the reaction of the nation's press to this decision was predictably intense, the ruling also had strong support, including the immediate endorsement of the Minnesota Legislature, which rejected an attempt to repeal the law by an 86 to 30 margin.²¹⁶

The United States Supreme Court's reversal of this Minnesota judgment by a bare 5 to 4 majority in *Near v. Minnesota*,²¹⁷ the first case where the United States Supreme Court struck down the action of a state for violating the freedom of the press, is well-known history. Interestingly, the Supreme Court did not find that the state practice constituted a prior restraint in the traditional sense. Rather, the practice was stricken in reliance upon an expanded concept of the free-press guarantees (made applicable to the states by the fourteenth amendment) as also forbidding other restraints on publication which, like the Minnesota statute, comprised "the essence of censorship."²¹⁸ Four dissenting justices, who adhered to the traditional definition, would have sustained the suppression.

The Minnesota opinion in the *Near* case stands at a turning point in the law of free speech. It was preceded and decisively influenced by the suppressionist philosophy that guided the action of numerous state authorities in the 19th

²¹⁵ *Id.* at 463–65, 219 N.W. at 773.

²¹⁶ BEMAN, *op. cit. supra* note 180, at 321. For a general list of sources supporting the position taken by the Minnesota court, see *id.* at 145–68, 188–91.

²¹⁷ 283 U.S. 697 (1931).

²¹⁸ *Id.* at 713.

century and even extended its effects into the 20th century. It was followed by the enlightened liberalism of our own day, when the freedom of the press is so jealously guarded that we are able to forget that not many years have elapsed since responsible lawyers and judges united in attempts to suppress publications whose scandalous and provocative character were thought to have caused that freedom to be forfeited through abuse.

The facts that lead to the suppression of the *Saturday Press* and the *Nauvoo Expositor* are strikingly similar, and the legal theories upon which each was suppressed are practically identical. The method of abatement — by destruction or by injunction — was different, but the end results and the consequences of the action so far as a free press was concerned were equivalent. The reasoning of the Minnesota opinion was a justification not only of what was done in Minneapolis, but also of what was done over eighty years earlier in Nauvoo. If the *Saturday Press*, like the *Nauvoo Expositor*, had been printed in 1844 (when there was no fourteenth amendment), this state court judgment abating a newspaper as a nuisance would have remained unchallenged.

The crucial issue to the legality of the *Expositor* suppression under the Illinois Constitution was whether the rule that the editor shall be "responsible for the abuse of that liberty" is limited to the prospect of civil damages and criminal penalties or whether it also includes the risk that the publication will be suppressed as a nuisance. It is clear that damages or criminal penalties were the usual form of responsibility that these were and the approved form of responsibility once the Illinois Supreme Court finally got around to ruling on the meaning of the "responsible for the abuse" provision in 1948.²¹⁹

There was no direct precedent in 1844 to support the use of nuisance-abatement powers to suppress a newspaper like the *Expositor*, but there was no direct authority against such use either. Subsequent history shows that other government officials also undertook to exercise suppressionist powers beyond the conventional damage or criminal action, and some even found high judicial approval for the use of the nuisance device. Once the Nauvoo City Council had concluded that its nuisance-abatement powers extended to the abatement of newspapers publishing scandalous or provocative material, it would be unrealistic to have expected them to observe limitations that were not articulated clearly in any constitution, statute or court decision of their day. To charge them with a willful violation of the Illinois free-press guarantees, one must overlook the suppressionist sentiments of the age in which they lived and attribute to them a higher devotion to the ideals of a free press than was exhibited from 1928 through 1931 by eight Justices of the Minnesota and United States Supreme Courts.

V. CONCLUSION

A historian friendly to the people of Nauvoo has called the suppression of the *Nauvoo Expositor* "the grand Mormon mistake . . ." ²²⁰ That its conse-

²¹⁹ "We would infer from this language that it refers to punishment by way of damages or criminal penalties." *Montgomery Ward & Co. v. United Retail Employees Union*, 400 Ill. 38, 46, 79 N.E.2d 46, 50 (1948).

²²⁰ Durham, *A Political Interpretation of Mormon History*, 13 PACIFIC HISTORICAL REV. 136, 140 (1944).

quences were disastrous to the Mormon leaders and that alternative means might better have been employed cannot be doubted. Nevertheless, the common assumption of historians that the action taken by the city council to suppress the paper as a nuisance was entirely illegal is not well founded. Aside from damages for unnecessary destruction of the press, for which the Nauvoo authorities were unquestionably liable, the remaining actions of the council, including its interpretation of the constitutional guarantee of a free press, can be supported by reference to the law of their day.

The Uniform Commercial Code in Utah

By Ronald N. Boyce*

Part I†

In an era when state boundaries are becoming less meaningful in commercial activities, it is not at all surprising that businessmen and lawyers have pressured for uniformity of laws. In 1938, the Merchants Association of New York City advocated a federal sales act to apply to all interstate sales.¹ This ominous-sounding demand led the National Conference of Commissioners on Uniform State Laws in 1940 to undertake the preparation of the Uniform Commercial Code.² The first official draft of the code was a result of joint activity between the National Conference and the American Law Institute and was published in 1952.³ Pennsylvania became the first state to adopt the new code effective in 1954.⁴ Since that time, the adoption of the Uniform Commercial Code or some form of it by other states has continued with great rapidity.

In 1965, the thirty-sixth Utah State Legislature adopted a form of the Uniform Commercial Code⁵ based upon the 1962 "Official Text and Comments."⁶ Utah thus became the thirty-first state to adopt a version of the code. Although only a short period has passed since the Utah Legislature's action, a total of forty-three jurisdictions has adopted the code as of this writing.⁷ It seems fairly certain that within a relatively short period of time all states will have adopted some form of the code. Consequently, although there are many local variations, a giant step will have been taken toward the uniformity of laws in commercial activities.

The code consists of ten "articles" which govern sales, commercial paper, bank collections, letters of credit, bulk sales, bills of lading and warehouse receipts, investment securities, and secured transactions. When the Utah version of the code became effective (midnight December 31, 1965),⁸ the provisions of the code displaced many familiar and long-standing provisions of

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† This is the first of two installments of this article. Part II will be published in the Summer 1966 issue of this *Review*.

¹ Malcolm, *The Uniform Commercial Code*, in ABA, *UNIFORM COMMERCIAL CODE HANDBOOK* 1, 3-4 (1964).

² *Id.* at 4.

³ *Id.* at 5. A permanent editorial board was established by two sponsors, the National Conference of Commissioners on the Uniform State Laws and the American Law Institute. The permanent editorial board has continued to study and improve the code, and the 1962 "Official Text and Comments" is the current approved draft of the board.

⁴ PA. STAT. ANN. tit. 12A (1954).

⁵ The code has been included in the Utah Code Annotated under a new title, 70A.

⁶ All references hereinafter made to the Uniform Commercial Code will be to the 1962 "Official Text and Comments."

⁷ In addition to forty-one states, the code has been adopted in the District of Columbia and the Virgin Islands.

⁸ UTAH CODE ANN. § 70A-10-101 (Supp. 1965).

commercial law⁹ including the Uniform Sales Act,¹⁰ Uniform Negotiable Instruments Law,¹¹ Uniform Stock Transfer Act,¹² Bulk Sales Act,¹³ Chattel Mortgage Law,¹⁴ Uniform Trust Receipts Act,¹⁵ Uniform Bills of Lading Act,¹⁶ Uniform Accounts Receivable Act,¹⁷ and other lesser known statutes.¹⁸ This does not mean that a complete revolution has occurred, since many of the old concepts and standards are retained in the code. In several areas the code merely restates existing common law rules and practices, or modernizes without destroying many of the commercial laws previously in use. The lawyer and businessman will find many of their old practices are still valid under the code; however, unfamiliar concepts and new terms also exist, especially in article 9¹⁹ relating to secured transactions.

The Utah adaptation departs very infrequently from the recommended Uniform Commercial Code, 1962. This, in part, can be attributed to the fact that the Utah code was the product of a committee of the Utah State Bar²⁰ which was composed of lawyers representing various commercial and public interests who approved of the successful implementation of the code in other jurisdictions. The committee gave generously of its time and was carefully guided by one of the principal purposes of the code — uniformity. The bill submitting the code to the legislature was drafted by the committee,²¹ and only one major amendment was made during the course of the act through the legislative mill.²² Consequently, the 1962 official text, the official comments of the

⁹ The repealer provision is found in UTAH CODE ANN. § 70A-10-102 (Supp. 1965). Those provisions of Utah law that were repealed with the enactment of the code will be cited herein as they appeared in the Utah Code Annotated prior to the effective date of the code.

¹⁰ UTAH CODE ANN. tit. 60 (Repl. vol. 1961).

¹¹ UTAH CODE ANN. tit. 44 (Repl. vol. 1960).

¹² UTAH CODE ANN. tit. 16, ch. 3 (Repl. vol. 1962).

¹³ UTAH CODE ANN. tit. 25, ch. 2 (1953).

¹⁴ UTAH CODE ANN. tit. 9, ch. 1 (Repl. vol. 1962).

¹⁵ UTAH CODE ANN. tit. 9, ch. 2 (Repl. vol. 1962).

¹⁶ The Uniform Bills of Lading Act was not adopted in Utah, but carrier practice has followed many of its provisions.

¹⁷ UTAH CODE ANN. tit. 9, ch. 3 (Repl. vol. 1962).

¹⁸ *E.g.*, UTAH CODE ANN. tit. 25, chs. 3, 4 (1953). See UTAH CODE ANN. § 70A-10-102 (Supp. 1965).

¹⁹ UTAH CODE ANN. tit. 70A, ch. 9 (Supp. 1965).

²⁰ The chairman of the Utah State Bar Committee on the Uniform Commercial Code was Beverly S. Clendenin. The author served as research chairman to the committee. Much of the success of the committee was due to the grant of funds from the State of Utah to cover the expense of the research and preparation of the legislation submitted to the 1965 Utah State Legislature.

²¹ Several companion bills to implement the code and avoid conflict with other provisions of Utah law were also submitted to the legislature. Not all of these passed. Those that did effected changes in the following sections of the UTAH CODE ANN. (1953): §§ 7-3-45, -48, -51 (bank-customer relations); § 38-2-3 (mechanics liens); § 78-37-1 (mortgage foreclosures). In addition, the secretary of state was given the right to retain fees collected under the Uniform Commercial Code to defray the costs of services under the code. The authority was limited to two years. Utah Laws 1965, ch. 155.

²² The Utah House of Representatives changed § 9-302 of the code by excluding public utility mortgages from the usual filing requirements and applied a special rule of filing for such mortgages containing personal property. UTAH CODE ANN. § 70A-9-302(5) (Supp. 1965).

code's permanent editorial board, and the wealth of writing relating to the code are material to the act as it is to be applied in Utah.

This article will attempt to explain wherein the code changes previous Utah law, and what important deviations the Utah enactment makes from the Uniform Commercial Code itself.

ARTICLE 1. GENERAL PROVISIONS

Article 1²³ provides many of the general concepts that serve as guidelines throughout the code, except where specific provisions indicate to the contrary. It expressly recognizes the right of parties to a transaction to vary the terms of their agreement from the otherwise applicable provisions of the code,²⁴ except where specifically prohibited. A general duty of "good faith, diligence, reasonableness and care" is imposed upon parties which may not be disclaimed.²⁵ Substantial flexibility is allowed, but sharp commercial practices are restricted.²⁶ The doctrines of estoppel, mistake, and duress, as well as other recognized principles of equity and common law, are left unimpaired by the code.²⁷

The parties to a transaction may generally designate which jurisdiction's law will be applicable to their transaction.²⁸ In absence of specification to the contrary, the code is applicable to any transaction bearing an appropriate relation to Utah.²⁹ In the case where a transaction bears a relationship to several jurisdictions, the applicable law, in the absence of an expression from the parties, is left to judicial determination.³⁰

Section 1-107 of the code introduces a new rule in Utah, and in most states adopting the code, by providing that a claim can be discharged by a written renunciation signed and delivered by an aggrieved party, even though there is no consideration.³¹ This provision changes the previous rule which required some form of consideration.³² Intent is still required, however, for a valid renunciation.³³ There is no need to establish a change of position or any equita-

²³ UTAH CODE ANN. tit. 70A, ch. 1 (Supp. 1965).

²⁴ UTAH CODE ANN. § 70A-1-102(3) (Supp. 1965).

²⁵ *Ibid.* However, the parties may set reasonable standards in regard to what constitutes good faith, and so forth.

²⁶ *Arcuri v. Weiss*, 198 Pa. Super. 506, 184 A.2d 224 (1962) (dictum).

²⁷ UTAH CODE ANN. § 70A-1-103 (Supp. 1965).

²⁸ UTAH CODE ANN. § 70A-1-105 (Supp. 1965). The code does specify that certain provisions are applicable to particular transactions and cannot be waived. For example, UTAH CODE ANN. § 70A-6-102 (Supp. 1965) governs the law applicable to bulk transfers, UTAH CODE ANN. §§ 70A-9-102, -103 (Supp. 1965) expresses the policy as to the applicable conflicts-of-law rule in secured transaction cases. However, to the extent conflict-of-law rules would allow, these provisions could be varied. UTAH CODE ANN. § 70A-1-105(2) (Supp. 1965).

²⁹ UNIFORM COMMERCIAL CODE § 1-105, comment 1, refers with approval to the ruling in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), where the Court approved the law of the state which bore a "reasonable relation" to the transaction.

³⁰ UNIFORM COMMERCIAL CODE § 1-105, comment 3.

³¹ UTAH CODE ANN. § 70A-1-107 (Supp. 1965).

³² *Browning v. Equitable Life Assur. Soc'y*, 94 Utah 532, 72 P.2d 1060 (1937); *Gray v. Bullen*, 50 Utah 270, 167 Pac. 683 (1917).

³³ The rule in *Rohwer v. Burrell*, 42 Utah 510, 134 Pac. 573 (1913), requiring parties to a release to have the intent to actually make the release remains the same.

ble reason for relief. The written renunciation is legally sufficient in itself. However, the section is applicable only to claims arising out of an alleged "breach" of obligation.

An innovation in statutory construction is added by the provision that makes section captions part of the act.³⁴ In other parts of the Utah Code Annotated, the section captions are merely guidelines added by the compiler. In an appropriate case, the section captions of the code could be useful aids in determining the meaning of a particular section.

Article 1 contains several definitions that are generally applicable to other articles in the code, although in particular articles or parts a special definition may be controlling.³⁵ Many of the definitions are in accord with those under prior uniform legislation or accepted judicial decision. However, one or two provisions add innovations or are of sufficient importance in other sections to warrant consideration.

One of the more important definitions, when considered with reference to the substantive provisions to which it applies, is that of the term "conspicuous."³⁶ For example, where the code requires a certain provision to be written so that it is conspicuous, such as a disclaimer of a warranty of merchantability,³⁷ it must be printed in heading capitals, or be in larger type, or contrasting color. The determination of whether a provision is conspicuous is for the court to make.

Another definition which promises to have an impact on commercial activity is the one defining when a person is "insolvent."³⁸ In *Rogers v. Ogden Bldg. & Sav. Ass'n.*,³⁹ the Utah Supreme Court rejected a contention that a person was insolvent merely because he could not pay his debts as they became due. The code specifies three tests to determine insolvency: (1) ceasing to pay debts in the ordinary course of business, (2) inability to pay debts as they become due, and (3) insolvency within the federal bankruptcy law. Thus, the code greatly broadens the previous Utah rule.⁴⁰ Since many rights of a party are enhanced or accelerated when another party becomes insolvent, such as stoppage in transit⁴¹ or other remedies available to a seller,⁴² the broadened definition of insolvency should result in some interesting changes in commercial dealings.⁴³

³⁴ UTAH CODE ANN. § 70A-1-109 (Supp. 1965).

³⁵ Compare, for example, the definition of value under UTAH CODE ANN. § 70A-1-201(44) (Supp. 1965) with that applicable in articles 3 and 4, UTAH CODE ANN. §§ 70A-3-303, 70A-4-208, -209 (Supp. 1965).

³⁶ UTAH CODE ANN. § 70A-1-201(10) (Supp. 1965).

³⁷ UTAH CODE ANN. § 70A-2-316(2) (Supp. 1965).

³⁸ UTAH CODE ANN. § 70A-1-201(23) (Supp. 1965).

³⁹ 30 Utah 188, 83 Pac. 754 (1905).

⁴⁰ See UTAH CODE ANN. § 60-6-5(3) (Repl. vol. 1961) for the Uniform Sales Act definition. The code is broader and clears up the ambiguities that existed under the Uniform Sales Act.

⁴¹ UTAH CODE ANN. § 70A-2-705(1) (Supp. 1965).

⁴² UTAH CODE ANN. § 70A-2-702 (Supp. 1965).

⁴³ The definition of insolvency encompasses "balance-sheet" insolvency and "equitable insolvency." 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 290 (1964).

The term "signed," as defined in the code, dispenses with the necessity for a complete signature,⁴⁴ and includes the term "authentication" which seems to allow printing or stamping. Furthermore, subscription at the bottom of a document is not required.⁴⁵

The code is not limited to the establishment of standards of conduct, formal requirements for contract, or the like, but it provides some rules of evidence and pleading. Article 1 provides that some documents are to be prima-facie evidence of their genuineness and authenticity,⁴⁶ and that notice must be given to the other party of an intent to use evidence of trade usage in construing the terms of an agreement in order to avoid surprise.⁴⁷

Section 70A-1-206 adds a new "Statute of Frauds" rule to the law of Utah. Except as to contracts involving the sale of goods, or investment securities, or security agreements,⁴⁸ contracts for the sale of personal property may not be enforced beyond 5,000 dollars unless a writing signed by a party to be bound, or his agent, and containing a stated price has been executed. There is conflict as to whether a contract in violation of this provision is enforceable up to 5,000 dollars or void altogether.⁴⁹ Normally, a contract over the limit of the Statute of Frauds is void and no part thereof is enforceable. However, in the official comments of this section, the use of the word "beyond," plus the equity of enforcing so much of a contract as would have been valid without a writing, except for the excess amount, warrant a construction that oral contracts should be enforceable up to the 5,000-dollar amount. Most personal-property transactions will be covered by the other sections requiring writings, and this requirement is probably applicable only to undocumented choses in action,⁵⁰ which should result in few problems in application.

Finally, article 1 allows a party to perform without prejudice to his rights by explicit reservation of any rights or claims. The reservation must be definite, but it need not be in writing.⁵¹

ARTICLE 2. SALES

As noted above,⁵² it was dissatisfaction with the varied judicial treatment of the Uniform Sales Act that led to the creation of the Uniform Commercial

⁴⁴ UTAH CODE ANN. § 70A-1-201 (Supp. 1965); see UNIFORM COMMERCIAL CODE § 1-201 comment 39; [1962-1964] N.M. ATT'Y GEN. BIENNIAL REP. 62-63.

⁴⁵ The formal requirements under the Statute of Frauds, UTAH CODE ANN. §§ 25-5-1, -4 (1953) are still applicable. The code does not affect the application of the Statute of Frauds, except as to sales of goods. Under the code, when a signed writing is required, a failure to have a subscription is not fatal.

⁴⁶ UTAH CODE ANN. § 70A-1-202 (Supp. 1965).

⁴⁷ UTAH CODE ANN. § 70A-1-205(6) (Supp. 1965).

⁴⁸ These subjects have their own Statutes of Frauds requirements. See UTAH CODE ANN. § 70A-2-201, -8-319, -9-203 (Supp. 1965).

⁴⁹ Compare Note, *The Uniform Commercial Code, Section 1-206 — A New Departure in the Statute of Frauds?*, 70 YALE L.J. 603 (1961), with 1 ANDERSON, UNIFORM COMMERCIAL CODE § 1-206:3 n.1 (1961) where it is stated: "Unlike the ordinary statute of frauds which requires a writing if a contract is to be enforceable at all, this section permits the enforcement of an oral contract up to the specified maximum."

⁵⁰ 1 HAWKLAND, *op. cit. supra* note 43, at 23.

⁵¹ UTAH CODE ANN. § 70A-1-207 (Supp. 1965).

⁵² See p. 904 *supra*.

Code. Article 2 is the code's answer to the previous law of sales, which constitutes the largest portion of the code. However, much of article 2 is similar to the Uniform Sales Act. Probably the greatest function performed by article 2 is its restatement and codification, with specificity, of many of the accepted principles of the law of sales that were based on judicial decision, as well as its resolution of conflicts that had existed because of varying interpretations of the Uniform Sales Act. Because many law review articles have treated in detail the provisions of article 2,⁵³ and since so much of the sales article is the same as previous law, only those areas which modify or depart from prior law will be considered in this discussion.

A. Definitions — The Special Treatment of Merchants

Article 2, like the other articles in the code, contains several definitions.⁵⁴ Most of these are consistent with the accepted meanings of the terms under prior law.⁵⁵ The code does specially define the terms "merchant," and "between merchants,"⁵⁶ carves out rules applicable to transactions between merchants and imposes special requirements in cases where a merchant is involved. To this extent, the code departs from accepted common law standards and adopts a civil law position distinguishing transactions which are truly commercial⁵⁷ in the sense of the market place. The term "merchant" is meant to cover the professional doing business,⁵⁸ not the person making an occasional sale. However, the person selling must be a professional with reference to the particular transaction. He must deal in goods of the kind sold, or otherwise hold himself out as having knowledge or skill peculiar to the goods involved. A merchant buying property for his own personal use is not a merchant within the definition set forth in the code.⁵⁹

⁵³ For an especially detailed section-by-section treatment of the sales articles see Project, 11 U.C.L.A.L. REV. 78 (1963); Project, 10 U.C.L.A.L. REV. 1087 (1963).

⁵⁴ UTAH CODE ANN. § 70A-2-103 to -106 (Supp. 1965).

⁵⁵ UTAH CODE ANN. § 70A-2-105(1) (Supp. 1965) defines "goods" primarily upon the basis of "movability" and includes movables (including specially manufactured goods), unborn young of animals, and growing crops to be severed from realty. UTAH CODE ANN. § 70A-2-107 (Supp. 1965). The holding in *Sidney Stevens Implement Co. v. Hintze*, 92 Utah 264, 67 P.2d 632 (1937), that a contract for labor and materials was not a sale of goods, would most probably remain the same under the code, although the definition of goods includes sales of food.

⁵⁶ UTAH CODE ANN. § 70A-2-104(1), (3) (Supp. 1965). A merchant is:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

....

"Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

⁵⁷ See Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14 (1962). The Uniform Sales Act had imposed separate standards for merchants under the sections on implied warranties of quality and sale by sample.

⁵⁸ UNIFORM COMMERCIAL CODE § 2-104, comment 2.

⁵⁹ *Ibid.*

B. Statute of Frauds

The code continues the requirement of a writing for sales of goods for a price of 500 dollars or more.⁶⁰ Because investment securities are not covered by article 2, but separately treated in article 8,⁶¹ the former decisions which applied the Uniform Sales Act Statute of Frauds provision to the sale of investment securities⁶² are no longer applicable to the law of sales, although a writing is still required by virtue of article 8.⁶³

The writing and the sales provision need only be sufficient to indicate that a contract has been made between the parties. It must be signed by the party who is to be held,⁶⁴ and specify a quantity of goods covered by the contract.⁶⁵ This does not mean that a contract calling for variable quantities cannot be made; on the contrary, open-end and needs contracts specify quantities and only the unit number is left for future determination.⁶⁶ A contract is enforceable only up to the particular quantity specified. The omission of price or other terms does not prevent enforcement. If the quantity of goods is shown, a court can usually determine the omitted terms without unjustly treating any party.⁶⁷

One of the major innovations of the code allows a letter of confirmation, setting forth enough of the oral agreement of the parties to meet the regular Statute of Frauds requirements, to bind the party to whom it is sent if the receiving party does not object to its contents within ten days of receipt.⁶⁸ The provision is applicable only between merchants, but it does provide an expeditious means for carrying on long-distance dealings or a sales business where numerous orders are made by telephone.⁶⁹

The code also provides exceptions to the writing requirement in the case of specially manufactured goods,⁷⁰ judicial admissions that a contract for a certain quantity exists,⁷¹ and partial payment or acceptance.⁷² However, the code allows enforcement of the contract by partial payment and acceptance on receipt and acceptance only to the amount of goods actually paid for or received, thus greatly narrowing the exception from its application under the

⁶⁰ UTAH CODE ANN. § 70A-2-201 (Supp. 1965). The previous Uniform Sales Act provision was UTAH CODE ANN. § 60-1-4 (Repl. vol. 1961).

⁶¹ UTAH CODE ANN. tit. 70A, ch. 8 (Supp. 1965).

⁶² *Woolley v. Loose*, 57 Utah 336, 194 Pac. 908 (1920); *cf. Western Securities v. Spiro*, 62 Utah 623, 221 Pac. 856 (1923).

⁶³ UTAH CODE ANN. § 70A-8-319 (Supp. 1965).

⁶⁴ UTAH CODE ANN. § 70A-2-201(1) (Supp. 1965).

⁶⁵ *Ibid.* See UNIFORM COMMERCIAL CODE § 2-201, comment 1.

⁶⁶ The code expressly recognizes and approves contracts for output requirements and exclusive dealing. UTAH CODE ANN. § 70A-2-306 (Supp. 1965).

⁶⁷ *HAWKLAND, SALES & BULK SALES* 27 (1958).

⁶⁸ UTAH CODE ANN. § 70A-2-201(2) (Supp. 1965).

⁶⁹ See *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959).

⁷⁰ UTAH CODE ANN. § 70A-2-201(3)(a) (Supp. 1965). This is in accord with the Uniform Sales Act provision, UTAH CODE ANN. § 60-1-4(2) (Repl. vol. 1961).

⁷¹ UTAH CODE ANN. § 70A-2-201(3)(b) (Supp. 1965). Although there is no comparable provision under the Uniform Sales Act, cases have held that it is inconsistent to admit the existence of a contract and plead the lack of writing. 1 *HAWKLAND, op. cit. supra* note 43, at 29.

⁷² UTAH CODE ANN. § 70A-2-201(3)(c) (Supp. 1965).

Uniform Sales Act.⁷³ Those who drafted the code were of the opinion that the partial-performance rule did not protect against fraud on a broader scale, but only to the extent of actual performance as evidenced by the activities of the parties.⁷⁴

C. Firm Offers

At common law and under the Uniform Sales Act, an offer made in writing which purported to remain open for a specified period unsupported by consideration was revocable by the offeree at any time prior to acceptance.⁷⁵ The code readily recognizes the injustice of this rule. For example, *A* could make an offer to *B* to sell needed goods at a particular price and indicate that the offer would remain open for thirty days. *B* in reliance upon the supposed firm offer would not accept immediately, but would look for the same goods from another seller where the commercial advantage to *B* was greater. If the market price increased during the intervening period, *A* could notify *B* that the offer was withdrawn, and in the absence of consideration *B* would be without recourse. To minimize the inequities in this situation, the code provides that an offer *by a merchant*, in writing and signed by the offeror, to buy or sell goods which gives assurance it will be held open is not revocable during the time stated or during a reasonable time not to exceed three months, whichever is a shorter period of time.⁷⁶ Of course, if the offer is supported by consideration, the usual rules apply, and a long-term option in excess of three months can be created.⁷⁷

The firm-offer provision should give greater stability to the current market sales transaction, and at the same time protect against abuse because of the requirements that the offer be in writing, signed by the offeror, and contain definite assurance that the offer will remain open. If an offeree desires to test the good faith of the offeror who makes an oral offer, he can always request that the offeror put the offer in writing. However, if the offeree makes the request by supplying a form to the offeror, the assurance that the offer will remain open must be separately signed by the offeror. A signature of the offeror on a general business form containing a firm-offer clause is not sufficient, absent a separate acknowledgment of the firm-offer provision by the offeror.⁷⁸

D. Formation

No special requirements are established for the formation of a contract for the sale of goods, except where the Statute of Frauds requirements are applica-

⁷³ UNIFORM COMMERCIAL CODE § 2-201, comment 2; *Williamson v. Martz*, 11 Pa. D. & C.2d 33 (Northumberland County Ct. 1958); *HAWKLAND, SALES & BULK SALES* 29 (1958).

⁷⁴ See *HAWKLAND, SALES & BULK SALES* 29 (1958).

⁷⁵ UNIFORM COMMERCIAL CODE § 2-205, comment 1. In certain instances the doctrine of estoppel may have been applicable, but this would require a showing of some action in reliance on the offer to the special detriment of the offeree. See Corbin, *The Uniform Commercial Code — Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950).

⁷⁶ UTAH CODE ANN. § 70A-2-205 (Supp. 1965).

⁷⁷ UNIFORM COMMERCIAL CODE § 2-205, comment 3.

⁷⁸ In view of the liberal definition of "signed" in UTAH CODE ANN. § 70A-2-201 (39) (Supp. 1965), the initials of the offeror would suffice, UNIFORM COMMERCIAL CODE § 2-205, comment 2.

ble. Terms may be left open and reasonable provisions relating to time and price will be implied.⁷⁹ The moment of formation of the contract need not be exact, and conduct constituting a recognition of the existence of a contract will suffice to show agreement. Seals and other such formalities are expressly made inoperative.⁸⁰ Unless the offer or the circumstances otherwise require, an acceptance may be by any reasonable means.⁸¹ An acceptance may be unilateral, but unless the offeror is notified of the acceptance within a reasonable time the offer is deemed to have lapsed before acceptance.⁸² If a buyer orders goods for prompt shipment, a shipment of conforming *or* nonconforming goods constitutes acceptance of the offer by the seller, unless he notifies the buyer that a shipment of nonconforming goods is offered as an accommodation. In the absence of notice that nonconforming goods are sent only as an accommodation, the shipment operates as an acceptance. The seller cannot escape liability by denying acceptance on the basis that he did not ship the kind or quality of goods requested.⁸³ A shipment of nonconforming goods constitutes an acceptance as well as an immediate breach which enables the buyer to hold the seller for damages.

The code departs materially from prior law in the area of offer and counter-offer. Under the prior law, if *A* made an offer to *B* and *B* purported to accept, but added additional terms, the acceptance was deemed a counteroffer and no contract was created.⁸⁴ In many instances the common law rule proved harsh. Often, the additional terms accompanying an acceptance were minor, and neither party had any real objection to them, or the terms were on a printed form supplied by the offeree who really did not intend the terms to be essential. The so-called "battle of forms" caused businessmen much trouble; consequently, the code has varied the traditional offer-and-acceptance rules.⁸⁵

Under the code, an acceptance, "even though it states" additional terms or terms "different from" the offer, creates a contract unless the "acceptance" is expressly made conditional on the acceptance of the added terms.⁸⁶ The additional terms, not properly qualified, are considered as proposals for additions

⁷⁹ UTAH CODE ANN. § 70A-2-204 (Supp. 1965). Cases like *Hi-Way Motor Co. v. Service Motor Co.*, 68 Utah 65, 249 Pac. 133 (1926), in which the court said a contract that left the price to future determination was not enforceable, are no longer valid. UTAH CODE ANN. § 70A-2-305 (Supp. 1965) expressly recognizes open-price contracts as enforceable. Generally, in such cases the price is "a reasonable price at the time for delivery."

⁸⁰ The confusion in Utah surrounding the law of seals has been to some extent alleviated. See Folland, *Instruments Under Seal*, 10 UTAH B. BULL. 59 (1940); Note, *The Status of the Common Law Seal Doctrine in Utah*, 3 UTAH L. REV. 73 (1952).

⁸¹ UTAH CODE ANN. § 70A-2-206(1) (a) (Supp. 1965).

⁸² UTAH CODE ANN. § 70A-2-206(2) (Supp. 1965).

⁸³ UTAH CODE ANN. § 70A-2-206(1) (b) (Supp. 1965). Professor Hawkland notes some courts have been receptive to the contention that shipment of nonconforming goods in a unilateral contract does not constitute an acceptance, *HAWKLAND, SALES & BULK SALES* 6 (1958). For criticism of the code's position, see Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577 (1950).

⁸⁴ Hawkland, *Major Changes Under the Uniform Commercial Code in the Formation and Term of Sales Contracts*, *Prac. Law.*, May 1964, p. 73, 79-82.

⁸⁵ *Ibid.*

⁸⁶ UTAH CODE ANN. § 70A-2-207(1) (Supp. 1965).

to the contract or proposals for further negotiation, but do not prevent formation of the contract.⁸⁷ In dealings "between merchants," the additional terms of the offeree become part of the contract unless one of three conditions are met:⁸⁸ first, if the offer expressly limits acceptance to its terms;⁸⁹ second, if the added terms materially alter the offer; and third, if notification is given by the offeror within a "reasonable time" that the added terms are unacceptable.⁹⁰ The code appears weak in providing that notice of nonacceptance of the additional terms in dealings between merchants may be given within a reasonable time. Although in many instances an argument for such an indefinite standard may have merit, it is reasonable to assume that this provision, because of its lack of specificity, will serve only to precipitate confusion and litigation. However, the code should alleviate the excessively strict results that attended the previous rules of offer and acceptance, even though many problem areas have yet to be worked out.⁹¹ The battle of forms will probably continue, but to the extent that immaterial and unimportant portions of an acceptance do not prohibit formation of a valid contract, the technicalities of the previous rule will have been eliminated. Even if the added terms are material, barring a conditional acceptance on the material terms, a contract is created and the material provisions excluded. If the merchant offeree determines that the added terms are really important, he may expressly condition his acceptance.

The key portion of the offer-acceptance rule of the code is that portion providing that an acceptance containing "material" alterations from the terms of the offer do not become a part of the contract in dealings between merchants.⁹² The code contains no definition of material alteration; however, the official comments would seem to indicate that a variation which contains an unreasonable element of surprise would constitute a material alteration.⁹³ A clause negating warranties, the changing of guaranty clauses, or a restriction on the time for complaints would be material departures from the offer, and would not become a part of the contract.⁹⁴

The code adds a further innovation by providing that after a contract has been formed it may be modified without consideration and the modification will be binding.⁹⁵

⁸⁷ UTAH CODE ANN. § 70A-2-207(2) (Supp. 1965).

⁸⁸ *Ibid.*

⁸⁹ UTAH CODE ANN. § 70A-2-207(2) (a) (Supp. 1965). In the case of dealings not "between merchants," presumably an offer not expressly conditioning the acceptance on the special terms of the offer would not prevent the offeree's added terms from becoming part of the contract.

⁹⁰ UTAH CODE ANN. § 70A-2-207(2) (b), (c) (Supp. 1965).

⁹¹ Hawkland, *The Buyer's Purchase Order Under the Uniform Commercial Code*, *Prac. Law.*, March 1965, p. 25.

⁹² UTAH CODE ANN. § 70A-2-207(2) (Supp. 1965).

⁹³ See UNIFORM COMMERCIAL CODE § 2-207, comment 5.

⁹⁴ UNIFORM COMMERCIAL CODE § 2-207, comment 4. Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962), held the offeree's addition of an arbitration clause was a material variance when the offer contained no arbitration clause.

⁹⁵ UTAH CODE ANN. § 70A-2-209(1) (Supp. 1965).

E. The Unconscionable-Contract Clause

In one area, the code provides for the most important addition to the law of sales since the Uniform Sales Act was promulgated. In most instances where two persons bargain at arm's length and the resulting contract, when made, is unconscionable to one party, in the absence of fraud, coercion, duress, or non-disclosure where a duty to disclose exists, the courts will be hesitant to grant relief from the contract. Some cases applying equitable principles have refused to enforce or recognize unconscionable provisions;⁹⁶ however, these cases have often been exceptional and specifically restricted to their facts. The code, however, provides that if a court determines as a matter of law that a contract was unconscionable at the time it was made it may refuse to enforce the contract or enforce only parts determined to be unobjectionable or limit the application of any unconscionable portion so that an unconscionable result is avoided.⁹⁷ The determination of unconscionability is left to the court.⁹⁸ The comment to this section in the official text indicates that the purpose of section 2-302 is the prevention of oppression and unfair surprise — not the avoidance of a contract because of one party's "superior bargaining power." However, recent construction given this section of the code leads to the conclusion that the courts will apply the term "unconscionable" in a broad sense and beyond the implied limitations indicated in the official comment.⁹⁹ It is doubtful that some of the alleged fears concerning courts' rewriting contracts under this provision will prove accurate;¹⁰⁰ however, a vehicle for curbing disturbing practices and allowing the courts to achieve equity between the contracting parties has been provided.

F. Warranties

The code imposes two warranties of title.¹⁰¹ The seller warrants good title and his right to transfer and also, that the goods are free from any security interest, lien, or other incumbrance of which the buyer is not otherwise informed. A merchant who regularly deals in goods of the kind sold also war-

⁹⁶ *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272 (1937). The official comment to § 2-302 of the code cites the *Weber Packing* case as illustrative of the import of § 2-302. However, it would seem that this case and the others relied upon in the comment do not go as far as the language of § 2-302 would allow.

⁹⁷ UTAH CODE ANN. § 70A-2-302 (Supp. 1965).

⁹⁸ Evidence as to the commercial setting or purpose of the contract is admissible on the issue of unconscionability. UTAH CODE ANN. § 70A-2-302(2) (Supp. 1965).

⁹⁹ In *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964), the court held that a siding contract where the buyer received labor and materials worth less than half the price of the contract was unconscionable. *But cf. Lundstrom v. Radio Corp. of America*, 405 P.2d 339 (Utah 1965). Most recently in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 455 (D.C. Cir. 1965), the Court of Appeals of the District of Columbia refused to enforce a contract covering series of transactions which had the effect of being a blanket contract for all of the buyer's property and prorated the payments made to each item purchased. When the buyer defaulted, the seller attempted to replevy all the property sold. The court ruled the contract unconscionable and remanded for further consideration. The court noted that the last item sold was a \$514 stereo set when the buyer's income was \$218 per month from welfare. It would appear that the extent of application of the "unconscionable-contract" doctrine is going to be very liberal.

¹⁰⁰ See Corman, *supra* note 57, at 26-27.

¹⁰¹ UTAH CODE ANN. § 70A-2-312 (Supp. 1965).

rants that the goods are free of third-party claims of infringement, and a buyer supplying specifications for goods to the seller must hold him harmless from infringement claims.¹⁰² The Uniform Sales Act provided for a warranty of quiet possession.¹⁰³ The code has no express provision for such warranty, but the warranty of good title probably encompasses the right to quiet possession.¹⁰⁴

The code strengthens the law of express warranties by increasing the seller's duties. Express warranties are created: (1) by an affirmation of fact or a promise made relating to the goods, (2) by a description which is part of the bargain, and (3) by supplying a sample which is part of the bargain.¹⁰⁵ In each case, the goods sold must conform to the affirmation, description, or sample. No particular reliance need be shown to fix liability on an express warranty.¹⁰⁶ Mere puffing talk, however, still is not a sufficient affirmation to create an express warranty.¹⁰⁷ A major improvement of the code from the Uniform Sales Act is the elevation of a warranty based on a sale by description to the level of an express warranty. Under the Uniform Sales Act, a sale by description was considered to include an implied warranty.¹⁰⁸

The code continues the division of implied warranties into two categories — merchantability and fitness for the particular purpose. The warranty of merchantability is available if the seller is a merchant with respect to the kind of goods sold.¹⁰⁹ The qualitative standard of the warranty of merchantability has been greatly clarified. Furthermore, the definition of a sale of goods is clarified since the supplying of food and drink is expressly recognized as a sale of goods, even when they are consumed on the seller's premises.¹¹⁰

The code specifies six criteria for determining whether goods are merchantable.¹¹¹ The goods must: (1) pass without objection in the trade; (2) if fungible, at least be of fair or average quality; (3) be fit for the ordinary purposes for which the goods are used; (4) run within the variations permitted by the agreement; (5) be adequately contained, packaged, and labeled; and (6) conform to any promises or affirmations made on the container or label.

¹⁰² UTAH CODE ANN. § 70A-2-312(3) (Supp. 1965).

¹⁰³ UTAH CODE ANN. § 60-1-13(2) (Repl. vol. 1961).

¹⁰⁴ UNIFORM COMMERCIAL CODE § 2-312, comment 1.

¹⁰⁵ UTAH CODE ANN. § 70A-2-313 (Supp. 1965).

¹⁰⁶ UNIFORM COMMERCIAL CODE § 2-313, comment 3. There seems to be some doubt as to whether, if there is a total absence of reliance, the benefits of the express warranty may be claimed. *City of Paragould v. International Power Mach. Co.*, 233 Ark. 872, 349 S.W.2d 332 (1961); *Silverman v. Samuel Mallinger Co.*, 375 Pa. 422, 100 A.2d 715 (1953); *Freedman, Products Liability Under the Uniform Commercial Code*, *Prac. Law.*, April 1964, p. 49, 51; *Project*, 10 U.C.L.A.L. REV. 1087, 1148 (1963).

¹⁰⁷ *Cf. Campbell v. Zion's Co-op. Home Bldg. & Real Estate Co.*, 46 Utah 1, 148 Pac. 401 (1914).

¹⁰⁸ *Compare* UTAH CODE ANN. § 60-1-14 (Repl. vol. 1961), *with* UTAH CODE ANN. § 70A-2-313(b) (Supp. 1965).

¹⁰⁹ UTAH CODE ANN. § 70A-2-314 (Supp. 1965).

¹¹⁰ The restrictive decisions refusing to apply a warranty of merchantability in the case of a sale of food and drink are invalidated; however, the decision of the Utah Supreme Court in *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961), refusing to apply the law of warranties to a hospital supplying a patient with blood during a blood transfusion will probably not be changed. *Comment, Incompatible Blood Transfusions*, *Military L. Rev.*, Oct. 1964, p. 129.

¹¹¹ UTAH CODE ANN. § 70A-2-314(2) (a) to (f) (Supp. 1965).

The above-itemized criteria are not exclusive.¹¹² Consequently, additional requirements may be imposed upon a merchant as the circumstances warrant. Trade usage or prior course of dealing may impose a higher duty of merchantability upon a seller of goods than would otherwise exist.¹¹³

The warranty of merchantability has not received substantial attention by the Utah Supreme Court. However, the code provisions offer a wide area in which liability can be imposed upon a seller whose product does not meet the standards of quality demanded. Of particular importance in the warranty of merchantability is the requirement that the goods be fit for the *ordinary* purposes for which such goods are used. This places a substantial burden upon the seller of any manufactured item, since the goods sold must be, as respects the buyer, fit for the uses to which such goods would normally be subjected. Thus, a purchaser of a step ladder may have a cause of action against a seller for the collapse of that ladder during the course of routine household chores. Proof of defective manufacture or negligence in the construction would not be necessary.

The code should do much to break down the reluctance of the Utah Supreme Court¹¹⁴ to accept the nonnegligence standards imposed by the law of warranty.

The code continues the warranty for fitness for a particular purpose.¹¹⁵ Where the seller at the time of contracting "has reason to know of any particular purpose" for which the goods purchased are required and "that the buyer is relying on the seller's skill or judgment" to furnish the required goods, an implied warranty arises that the goods will be fit for the *particular* purpose for which the buyer has acquired the goods. The buyer need not directly make known to the seller the purpose for which he seeks the goods, if the seller otherwise has reasonable notice through some medium of the intended use of the goods and, under the circumstances, should realize that the buyer is relying upon the seller's skill and judgment.¹¹⁶ Under the Uniform Sales Act,¹¹⁷ if a purchaser requested goods under a brand name, it was often ruled that he was not entitled to rely upon the warranty of fitness for a particular purpose. The courts reasoned that the purchaser was relying upon the brand name and not upon the skill and judgment of the seller.¹¹⁸ The code ameliorates that position; the official comments provide that purchase by brand name is only one of the facts to be considered in determining whether the buyer actually relied upon the seller's skill or judgment.¹¹⁹

¹¹² UNIFORM COMMERCIAL CODE § 2-314, comment 6.

¹¹³ UTAH CODE ANN. § 70A-2-314(3) (Supp. 1965).

¹¹⁴ See *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 264 P.2d 1085 (1961); *Milligan v. Coca-Cola Bottling Co.*, 11 Utah 2d 30, 354 P.2d 580 (1960).

¹¹⁵ UTAH CODE ANN. § 70A-2-315 (Supp. 1965).

¹¹⁶ UNIFORM COMMERCIAL CODE § 2-315, comment 1.

¹¹⁷ UTAH CODE ANN. § 60-1-15(1) (Repl. vol. 1961).

¹¹⁸ *Landes & Co. v. Fallows*, 81 Utah 432, 19 P.2d 389 (1933); *HAWKLAND, SALES & BULK SALES* 43 (1958).

¹¹⁹ UNIFORM COMMERCIAL CODE § 2-315, comment 5.

Section 2-318 of the 1962 Uniform Commercial Code expressly recognizes that privity is not a bar to a suit against the seller, if the person seeking to avail himself of the warranty is in the family or household of the buyer or a guest in the buyer's home. That provision was not adopted in Utah. The bar committee considering the adoption of the Uniform Commercial Code believed that the provision was too restrictive, and that, since the law is still in transition, the better course would be to leave the question of privity to the courts.¹²⁰ This view was expressed by a member of the bar committee on the floor of the Utah State Legislature.¹²¹ Therefore, no adverse inference should be drawn from the failure of the legislature to enact the code's provision recognizing the right of persons other than the purchaser to rely upon the warranties otherwise applicable to a sale.

The code does not prohibit a seller from excluding all warranties, express or implied. It does, however, require that disclaimer of warranties meet certain standards so that the purchaser has reasonable notice that the warranties of fitness for purpose or merchantability are not applicable, and that the seller is not making any express affirmation with reference to the goods.¹²² Warranties will, wherever possible, be construed as cumulative,¹²³ and conduct tending to create an express warranty will not be deemed negated by any disclaimer in the contract, assuming the parol-evidence rule is not otherwise applicable.¹²⁴ In order to negate a warranty of merchantability, the language used in the disclaimer must expressly use the term "merchantability," and the disclaiming phraseology must be conspicuously set forth in the contract.¹²⁵ However, standard expressions, such as "as is," "with all faults," or other language which indicates that there are no warranties with reference to the goods, will operate as a disclaimer of all warranties.¹²⁶

G. Title

One of the major criticisms of the Uniform Sales Act was directed at the artificiality of the concept of title. In the absence of particular provisions, title often passed at times when the buyer and seller really did not intend the interest in the goods to pass. The risk of loss and other duties and obligations imposed upon the parties were determined by the arbitrary standard of passage of title. The rights, obligations, and remedies of a seller and buyer are to be determined by the express provisions of the code and not by the concept of title, thus limiting the role of title under the code.¹²⁷ The code sets forth with particularity

¹²⁰ The Utah State Bar Committee was of the opinion that § 2-318 had resulted in an overly narrow construction being applied to the scope of the warranties imposed by the code. *Cf. Jacquot v. William Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), where the general case law appears to be moving toward total elimination of the privity requirement.

¹²¹ The author stated the position of the Utah State Bar Committee in an explanatory speech before the Utah State Senate and the House of Representatives.

¹²² UTAH CODE ANN. § 70A-2-316 (Supp. 1965).

¹²³ UTAH CODE ANN. § 70A-2-317 (Supp. 1965).

¹²⁴ UTAH CODE ANN. § 70A-2-316 (Supp. 1965).

¹²⁵ UTAH CODE ANN. § 70A-2-316(2) (Supp. 1965).

¹²⁶ UTAH CODE ANN. § 70A-2-316 (Supp. 1965).

¹²⁷ UTAH CODE ANN. § 70A-2-401 (Supp. 1965).

the duties of the parties¹²⁸ and the requirements for performance,¹²⁹ and allocates the risk of loss between the buyer and the seller. The concept of title is diminished, if from nothing else, by the express provisions governing the relationships between parties.¹³⁰

H. Remedies

The remedies available to either party are cumulative¹³¹ and the doctrine of election of remedies is rejected as a fundamental policy.¹³² Some of the confusion surrounding the necessity for an election between the right of rescission and an action for damages has been eliminated.¹³³

The seller still retains the right to stop goods in transit.¹³⁴ If the buyer is determined to be insolvent, the broadened definition of the code allows the seller to refuse delivery except for cash. If credit has been extended during a period of insolvency, the seller may reclaim goods delivered after demand and within ten days of the buyer's receipt of the goods.¹³⁵ If a misrepresentation concerning solvency was made within three months before delivery of the goods, the ten-day limitation is not applicable, although the misrepresentation must be other than that of an intent to pay.¹³⁶

The seller has the right on rejection by the buyer or on repudiation to resell the goods¹³⁷ by either public or private sale. If the sale is to be private, reasonable notice to the buyer of the seller's intention to resell must be given.¹³⁸

Where the seller breaches the contract, the buyer may "cover" or purchase the needed goods from another source and hold the seller for any resulting damages, the latter being the difference between the contract price and the cover price plus incidental and consequential damages.¹³⁹ The code expressly allows recovery of incidental and consequential damages, such as commissions, necessarily incurred in effecting cover, reasonable expenses incurred in caring for or shipping goods, and loss reasonably flowing from the breach, including injury proximately resulting from a breach of warranty.¹⁴⁰ Thus, the buyer may recover loss of profits from an expected resale if the seller had reason to know of the special need¹⁴¹ and effective "cover" could not be obtained.

The code allows the parties forming a contract to liquidate damages so long as the liquidation clause does not provide for a penalty on default of either

¹²⁸ UTAH CODE ANN. tit. 70A, ch. 2, pts. 5, 6 (Supp. 1965).

¹²⁹ UTAH CODE ANN. §§ 70A-2-501 to -515 (Supp. 1965).

¹³⁰ UTAH CODE ANN. §§ 70A-2-509, -510 (Supp. 1965).

¹³¹ UTAH CODE ANN. §§ 70A-2-703, -711 (Supp. 1965).

¹³² UNIFORM COMMERCIAL CODE § 2-703, comment 1.

¹³³ *Cf. Braginetz v. Foreign Motor Sales, Inc.*, 76 Dauph. 1, 5 (Pa. C.P. 1960) (indicating a need for election at the time of trial).

¹³⁴ UTAH CODE ANN. § 70A-2-705 (Supp. 1965).

¹³⁵ UTAH CODE ANN. § 70A-2-702 (Supp. 1965).

¹³⁶ *Ibid.*

¹³⁷ UTAH CODE ANN. §§ 70A-2-703, -706 (Supp. 1965).

¹³⁸ UTAH CODE ANN. § 70A-2-706 (Supp. 1965).

¹³⁹ UTAH CODE ANN. § 70A-2-712 (Supp. 1965).

¹⁴⁰ UTAH CODE ANN. § 70A-2-715 (Supp. 1965).

¹⁴¹ The rule in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), remains the basis of § 2-715.

party.¹⁴² The code also gives the buyer a special right to restitution where the seller justifiably withholds delivery. The buyer may recover the amount by which any payments exceed any liquidation agreement, or twenty per cent of the value of total performance or 500 dollars, whichever is smaller, subject, of course, to the seller's offset for damages and other benefits received by the buyer from the contract.¹⁴³ Therefore, a modified form of equitable recovery is provided to the defaulting buyer; however, it seems to be available only in cases where the payment-damage differential is excessive.

The code also modifies the statute of limitations. Suit must be commenced within four years after the cause of action has accrued.¹⁴⁴ It is immaterial whether the contract is in writing. The general statutory provision of Utah law providing for a six-year limitation period on a written contract¹⁴⁵ is not applicable to sales contracts.¹⁴⁶

ARTICLE 3. COMMERCIAL PAPER

The provisions of article 3¹⁴⁷ of the code dealing with commercial paper supplant the provisions of the Uniform Negotiable Instruments Law.¹⁴⁸ Few major changes have been made in the law as it existed under the NIL; however, article 3 was promulgated because of the vague provisions of the NIL¹⁴⁹ and the need for general clarification.¹⁵⁰ Article 3 is more narrowly drawn than the NIL, since investment securities are expressly excluded from its scope,¹⁵¹ thereby clarifying the instances of the application of the law of commercial paper to negotiable securities. The relationship of a bank to its customer and the interrelationship between banks are governed by article 4.¹⁵² Article 3 contains those provisions of the law generally associated with the making, issuance, transfer, and acceptance of commercial paper.¹⁵³ Although a strict section-by-section comparison of article 3 with the NIL will reveal many modifications and variations, most of these are mere housekeeping changes. This article will attempt to highlight those areas of the law of commercial paper in Utah that have been materially changed by the adoption of the code.

¹⁴² *Unit Vending Corp. v. Tobin Enterprises*, 194 Pa. Super. 470, 168 A.2d 750 (1961); UTAH CODE ANN. § 70A-2-718(1) (Supp. 1965). In accord with the rule are *Strand v. Mayne*, 14 Utah 2d 355, 384 P.2d 396 (1962); *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446 (1952).

¹⁴³ UTAH CODE ANN. §§ 70A-2-718(2), (3) (Supp. 1965).

¹⁴⁴ UTAH CODE ANN. § 70A-2-725(1) (Supp. 1965).

¹⁴⁵ UTAH CODE ANN. § 78-12-23(2) (1953).

¹⁴⁶ Utah Bar Comm. on the UCC, Notes on Article 2, at 49 (Oct. 3, 1964).

¹⁴⁷ UTAH CODE ANN. tit. 70A, ch. 3 (Supp. 1965).

¹⁴⁸ Cited herein as NIL. References to the Utah code are to the provisions of the NIL as adopted in Utah and contained in UTAH CODE ANN. tit. 44 (Repl. vol. 1960) prior to the effective date in Utah of the Uniform Commercial Code.

¹⁴⁹ BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 89 (7th ed. Beutel 1948).

¹⁵⁰ Leary, *Article III Commercial Paper*, in *UNIFORM COMMERCIAL CODE HANDBOOK* 87 (1964).

¹⁵¹ UTAH CODE ANN. § 70A-3-103 (Supp. 1965). Investment securities are covered under UTAH CODE ANN. tit. 70A, ch. 8 (Supp. 1965).

¹⁵² UTAH CODE ANN. tit. 70A, ch. 4 (Supp. 1965).

¹⁵³ Article 3 is limited in its scope by UTAH CODE ANN. § 70A-3-103 (Supp. 1965).

A. Form and Interpretation

An unconditional promise to pay an instrument is not made conditional because of implied or constructive conditions, or because the instrument states it matures "per" a certain transaction, refers to or arises from a separate agreement, or mentions the right of acceleration or prepayment with reference to another agreement.¹⁵⁴ Some latitude from the general rule that an instrument may not be governed by or subject to a collateral agreement is allowed, although this is not a major departure from the implications in some early Utah cases.¹⁵⁵ The code makes one exception to the rule that an instrument limited to payment out of a particular fund is conditional, in the case of an instrument issued by a government or governmental agency or unit.¹⁵⁶ However, the code also recognizes that an instrument is not conditional if it is limited to payment out of the entire assets of a partnership, unincorporated association, trust, or estate, where the instrument is issued on behalf of such a body.¹⁵⁷

The code reverses the NIL rule that an instrument may be issued payable on an event certain to happen but uncertain as to time.¹⁵⁸ If an instrument issued under the code is subject to such a condition of payment, it is not payable at a time certain and not negotiable.¹⁵⁹ The theory behind the change is that instruments payable at vague and indefinite times are not valuable commercial tools and create more problems than they solve, thereby warranting their elimination.¹⁶⁰

The code makes it clear that instruments subject to acceleration are not nonnegotiable because of that factor alone, if they are otherwise payable at a time certain.¹⁶¹ This avoids some of the confusion that existed under the NIL,¹⁶² although the Utah courts did not seem burdened by the confusion that existed in other jurisdictions surrounding acceleration provisions.¹⁶³

The code provides that when an incomplete instrument is signed and the contents show an intent that it be made complete, upon completion, the instru-

¹⁵⁴ UTAH CODE ANN. § 70A-3-105 (Supp. 1965).

¹⁵⁵ *Utah Lake Irrigation Co. v. Allen*, 64 Utah 511, 231 Pac. 818 (1924); see *Jensen v. Lichtenstein*, 45 Utah 320, 145 Pac. 1036 (1915); *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753 (1892).

¹⁵⁶ UTAH CODE ANN. § 70A-3-105(1)(g) (Supp. 1965).

¹⁵⁷ UTAH CODE ANN. § 70A-3-105(1)(h) (Supp. 1965).

¹⁵⁸ UTAH CODE ANN. § 44-1-4 (Repl. vol. 1960).

¹⁵⁹ UTAH CODE ANN. § 70A-3-109(2) (Supp. 1965).

¹⁶⁰ UNIFORM COMMERCIAL CODE § 3-109, comment 1 notes:

Subsection (2) reverses the rule of the original Section 4(3) as to instruments payable after events certain to happen but uncertain as to time. Almost the only use of such instruments has been in the anticipation of inheritance or future interests by borrowing on post-obituary notes. These have been much more common in England than in the United States. They are at best questionable paper, not acceptable in general commerce, with no good reason for according them free circulation as negotiable instruments. As in the case of the occasional note payable "one year after the war" or at a similar uncertain date, they are likely to be made under unusual circumstances suggesting good reason for preserving defenses of the maker. They are accordingly eliminated.

¹⁶¹ UTAH CODE ANN. § 70A-3-109(1)(c) (Supp. 1965); *accord*, *Jensen v. Lichtenstein*, 45 Utah 320, 145 Pac. 1036 (1915).

¹⁶² *Leary*, *supra* note 150, at 98-100.

¹⁶³ *Jensen v. Lichtenstein*, 45 Utah 320, 145 Pac. 1036 (1915).

ment is enforceable¹⁶⁴ according to its tenor by a holder in due course, even if completed contrary to an authorization,¹⁶⁵ or by a holder to the extent of actual authorization if the amount of completion exceeds authority.¹⁶⁶ Under the NIL, an incomplete check improperly delivered provided the maker with a complete defense even against a holder in due course.¹⁶⁷ However, under the code, a person signing blank checks is responsible to a holder in due course in the amount of the instrument.¹⁶⁸ This clearly seems proper. A person executing blank instruments should bear the consequences of their introduction into the stream of commercial activity even though the tenor of completion was unauthorized.

The code departs from the NIL in the case of an instrument made payable to an agent or officer by providing that the instrument will be determined as payable to the principal, but the agent may be deemed a holder and may cash the instrument.¹⁶⁹

B. Transfer and Negotiation

Often instruments are executed and the name of the payee is misspelled or incorrect. Under the NIL, it was uncertain what the holder of such an instrument could do to negotiate the instrument where the payee's or indorsee's name is misspelled or is otherwise erroneous.¹⁷⁰ The code expressly allows the holder of such an instrument to indorse in his proper name or in the misspelled name, or both.¹⁷¹ However, the person receiving the instrument may require the indorsee to sign both the improper name and his proper name.

The code reverses the NIL policy that when an instrument is either drawn or becomes bearer paper, even with a subsequent special indorsement, the paper could be transferred by delivery alone. Under the code, a person may issue an instrument payable to bearer and thereafter, in the course of negotiations, a subsequent holder may indorse specially. Thereafter, any indorsement will require the signature of the person to whom it is negotiated, and transfer by delivery will not be considered a negotiation.¹⁷² Of course, the process of special and blank indorsements could be repeated many times during negotiation.

The code provides that a restrictive indorsement does not destroy negotiability, thus changing the previous provisions of the NIL.¹⁷³ An indorsement under the code is restrictive if it: (1) is conditional; (2) is prohibitive of

¹⁶⁴ UTAH CODE ANN. § 70A-3-115(1) (Supp. 1965).

¹⁶⁵ UTAH CODE ANN. § 70A-3-407(3) (Supp. 1965).

¹⁶⁶ UTAH CODE ANN. § 70A-3-407(2) (b) (Supp. 1965).

¹⁶⁷ UTAH CODE ANN. § 44-1-16 (Repl. vol. 1960).

¹⁶⁸ WYO. LEGISLATIVE RESEARCH COMM., UNIFORM COMMERCIAL CODE—RESEARCH PUBLICATION No. 1, at 10 (1960).

¹⁶⁹ UTAH CODE ANN. § 70A-3-117(a) (Supp. 1965).

¹⁷⁰ UTAH CODE ANN. § 44-1-44 (Repl. vol. 1960); see Annot., 153 A.L.R. 598 (1944).

¹⁷¹ UTAH CODE ANN. § 70A-3-203 (Supp. 1965).

¹⁷² UTAH CODE ANN. § 70A-3-204 (Supp. 1965). "The special indorsee may of course make [the instrument] . . . payable to bearer again by himself indorsing in blank." UNIFORM COMMERCIAL CODE § 3-205, comment.

¹⁷³ UTAH CODE ANN. 70A-3-206(1) (Supp. 1965).

transfer; (3) includes words of special purpose, such as "deposit" or "collection"; or (4) states that it is for the benefit of any particular person.¹⁷⁴ The immediate indorsee must see that the restrictive indorsement is complied with in order to become a holder in due course.¹⁷⁵ The fact that the instrument contains a restrictive indorsement is not notice to subsequent takers and does not prevent further transfer or negotiation of the instrument. A subsequent taker of an instrument restrictively indorsed may be a holder in due course if the other requirements necessary to that status are met.¹⁷⁶ Of course, if a subsequent holder has knowledge of a breach of duty by the indorsee first taking subject to the restrictive paper, he cannot claim the status of a holder in due course. Since restrictive indorsements are common for the purposes of collection and in the handling of special interbank matters, the Uniform Commercial Code makes a substantial improvement over the previous position of the NIL which had cast doubt on the effect of such indorsements.¹⁷⁷

C. Position of a Holder

Under the code, a holder, even if he is not the owner of the instrument, may transfer or negotiate an instrument and discharge or enforce payment.¹⁷⁸ Under NIL, a holder could become a holder in due course by showing that he took for value, in good faith, and without notice of infirmity or other defect in the title, an instrument that was complete and regular on its face and not overdue.¹⁷⁹ The code simplifies the position of a holder in due course so far as the essential elements of that position are concerned. Under the code, a holder may be a holder in due course if the instrument is taken: (1) for value, (2) in good faith, and (3) without notice that it is overdue or dishonored or without knowledge of any defense.¹⁸⁰ The code also states specifically that a payee may be a holder in due course,¹⁸¹ which is in accord with present Utah law.¹⁸²

Persons who purchase an instrument at a judicial sale or as part of a bulk transaction not in the regular course of business of the transferor or who acquire an instrument in taking over an estate are precluded from being holders in due course.¹⁸³ The code, however, does not make clear whether these persons who do not take "in the ordinary course of business" are the only ones who do not have the right to claim the status of a holder in due course. Thus, many situations could be considered where a person takes the instrument not in the course of business but under some special circumstances which do not entitle him to protection as a holder in due course. The itemization con-

¹⁷⁴ UTAH CODE ANN. § 70A-3-205 (Supp. 1965).

¹⁷⁵ UTAH CODE ANN. § 70A-3-206(3) (Supp. 1965).

¹⁷⁶ UTAH CODE ANN. § 70A-3-206(4) (Supp. 1965); cf. UTAH CODE ANN. § 70A-3-302 (Supp. 1965).

¹⁷⁷ UTAH CODE ANN. § 44-1-38 (Repl. vol. 1960).

¹⁷⁸ UTAH CODE ANN. § 70A-3-301 (Supp. 1965).

¹⁷⁹ UTAH CODE ANN. § 44-1-53 (Repl. vol. 1960).

¹⁸⁰ UTAH CODE ANN. § 70A-3-302 (Supp. 1965).

¹⁸¹ UTAH CODE ANN. § 70A-3-302(2) (Supp. 1965).

¹⁸² Christensen v. Financial Serv. Co., 14 Utah 2d 101, 377 P.2d 1010 (1963); Annot., 2 A.L.R.3d 1151 (1965).

¹⁸³ UTAH CODE ANN. § 70A-3-302(3) (Supp. 1965).

tained in the code probably was not intended to be exhaustive. However, because of the obscurity surrounding this point, several problem areas are likely to come before the courts.¹⁸⁴

From the standpoint of day-to-day commercial dealings, the concept of a holder in due course has not changed significantly from the NIL. However, it would have been much to the credit of the code draftsmen had they reframed the concept of a holder in due course, thereby eliminating the necessity for specific mention of those areas where an individual, otherwise meeting the requisite criteria, is not a holder in due course. The general provisions would thus not have been cluttered by specific exceptions. This would require a concept based on the necessities of trade or usage and avoid the confusion raised by the specific exceptions. It should be pointed out that, although the code requires the taker of an instrument to be without notice that it is overdue or dishonored to qualify as a holder in due course, it does not prohibit an individual from being a holder in due course, even though the instrument is, in fact, overdue or has been previously dishonored, in the absence of notice to that effect. Although this is a minor departure from the NIL rigidity, it should alleviate some of the inequities that occurred under previous law.¹⁸⁵

In order for a holder to be a holder in due course, he must be without notice of any defect in the instrument. Under the NIL, an instrument taken within an unreasonable time after its issue put the holder on notice and prevented him from becoming a holder in due course.¹⁸⁶ The vagueness of the term "unreasonable time" created many problems. The code, in an attempt to cure the question of when a check is stale for the purposes of determining if a holder is a holder in due course, provides that a taker under most circumstances has notice that an instrument is overdue, if it is a demand instrument and the taking occurs more than thirty days after issue.¹⁸⁷ The thirty-day period is a shorter period than that which had been deemed unreasonable under previous case law.¹⁸⁸ Whether it will prove to be too short a period and become burdensome upon commercial activities can only be determined from experience. Probably, after the commercial community has become acquainted with the short provision of time from the date of issue to the taking of the check, it will encourage the immediate negotiation of instruments. Adaptation to this provision should, in time, assist commercial activity by speeding up the flow of instruments and reducing the number of stale checks.

The code sets forth the rights of a holder in due course and enumerates the defenses to which his position is superior.¹⁸⁹ Generally, the code recognizes that a "real" defense, as it existed under the NIL, is available against a holder in due course. Infancy, void instruments, fraud in fact, discharge, and insolvency are all recognized as real defenses available against a holder in due course.

¹⁸⁴ Leary, *supra* note 150, at 109-10.

¹⁸⁵ UNIFORM COMMERCIAL CODE § 3-302, comment 1.

¹⁸⁶ UTAH CODE ANN. §§ 44-1-54, -55 (Repl. vol. 1960).

¹⁸⁷ UTAH CODE ANN. § 70A-3-304(3)(c) (Supp. 1965).

¹⁸⁸ WYO. LEGISLATIVE RESEARCH COMM., *op. cit. supra* note 168, at 14.

¹⁸⁹ UTAH CODE ANN. § 70A-3-305 (Supp. 1965).

Simple contract defenses, such as failure of consideration, nondelivery, or other similar defects are not available against a holder in due course.¹⁹⁰ Where it is shown that the title of any person who negotiated the instrument was defective, the code imposes the burden of establishing his position as a holder in due course on the holder of the instrument. However, until such a showing, every holder is presumed to be a holder in due course.¹⁹¹

The code adds a special rule of pleading in the case of a suit on an instrument. Unless the pleadings expressly deny the validity of a signature on an instrument, its validity is deemed admitted.¹⁹² Even where a signature is contested, it is presumed to be genuine or authorized, unless the signer has died or become incompetent. However, the overall burden of proof remains upon the party claiming under the signature. The Utah committee studying the Uniform Commercial Code recommended that rule 9 of the Utah Rules of Civil Procedure be amended to conform to special pleading requirements set forth under the code.¹⁹³ This same problem exists under other articles of the code, and it might behoove the Utah Supreme Court, to avoid confusion, by appointing a committee to harmonize rule 9 with the special provisions of the Uniform Commercial Code relating to pleadings.

D. Liability of Parties

The code goes to great lengths to specify the liability among parties to an instrument. Most of this material is new to Utah statutory law, but it is generally in accord with the case law governing commercial paper.

Confusion had existed under the NIL concerning imposters or fictitious payees.¹⁹⁴ The NIL had no provision relating to an imposter as a payee of an instrument and was substantially confusing in the case of a fictitious or non-existing person.¹⁹⁵ The code specifies that a check, made payable to a named payee, is not bearer paper, even though an imposter had induced the instrument to be issued, or the drawer intended the payee named therein to have no interest, or an agent or employee of the drawer supplied the payee's name and intended that he have no interest in the instrument. In most cases, this will have the same effect as the NIL so far as negotiation is concerned, which classified fictitious payee paper as bearer paper, but the code rule is also substantially more realistic in dealing with the nature of the instrument involved as it concerns the relative liability of parties. Certainly, there is no reason to continue to treat the fictitious-payee situation as a special bearer-instrument problem. The risk of loss should be upon the individual who has allowed the instrument to be issued, not upon the fortuitous events of its negotiation.

The code adopts the rule of *Young v. Grote*,¹⁹⁶ and provides that a person, who by his negligence substantially contributes to the material alteration of an

¹⁹⁰ Cf. UTAH CODE ANN. § 70A-3-306 (Supp. 1965).

¹⁹¹ UTAH CODE ANN. § 70A-3-307 (Supp. 1965).

¹⁹² *Ibid.*

¹⁹³ Utah Bar. Comm. on the UCC, Notes on Article 3, at 17 (Nov. 7, 1964).

¹⁹⁴ See BRITTON, BILLS AND NOTES §§ 148-50 (2d ed. 1961).

¹⁹⁵ Cf. UTAH CODE ANN. § 44-1-10(3) (Repl. vol. 1960); Abel, *The Imposter Payee: Or Rhode Island Was Right*, 1940 WIS. L. REV. 161.

¹⁹⁶ 4 Bing. 253, 130 Eng. Rep. 764 (C.P. 1827).

instrument, is precluded from asserting the defense of alteration or forgery against a holder in due course, or a drawee otherwise acting in good faith.¹⁹⁷ The code rejects case law which held that the maker owes no duty of care to anyone except the drawee.¹⁹⁸ Clearly, this protection to the holder in due course is in keeping with the theory of greater commercial freedom for negotiable instruments. Since negligence has usually been found where spaces are left in the body of an instrument, this provision should allow substantial protection for holders of altered instruments. Furthermore, a holder in due course may enforce an altered instrument to the full tenor of the instrument, if the maker's negligence, or the negligence of the person sought to be charged, substantially contributed to the alteration. A material and fraudulent alteration by a holder discharges any party whose contract is thereby changed. If the contract is not changed, a party is not discharged and the instrument may be enforced according to its original tenor. A holder in due course may in all cases enforce the instrument according to its original tenor, and, if an incomplete instrument is improperly completed, he may enforce it as completed.¹⁹⁹ The rule relating to material and fraudulent alterations as a basis for discharge of a party on an instrument applies only where the material alteration is made by the holder, thus correcting some of the "unsatisfactory 'spoilation' law which developed under the NIL,"²⁰⁰ where an alteration made by someone other than a holder could affect the relationship of parties to the instrument.

E. Presentment, Protest, and Discharge

One of the general benefits of the Uniform Commercial Code is that it codifies the law in instances that previously have been dependent on case law, or obscure or ambiguous statutes. In the cases of presentment, protest, and discharge of commercial paper, the code has spelled out with substantial clarity the applicable rules. This should be significantly beneficial in assisting commercial institutions to determine their obligations in the process of collection of commercial paper.

The requirement of protest created a problem area in the previous law. The code makes it clear that protest is no longer necessary unless the instrument is obviously an international instrument.²⁰¹ It is no longer necessary to have an out-of-state instrument protested, so long as it is drawn payable in the United States.

Under the code, any demand for payment is proper presentment; the failure to meet any of the elements concerning particular time or place is not fatal in the absence of some special requirement in the instrument itself.²⁰² However, presentment must be at a reasonable hour.²⁰³ The obligation is placed upon the

¹⁹⁷ UTAH CODE ANN. § 70A-3-406 (Supp. 1965).

¹⁹⁸ UNIFORM COMMERCIAL CODE § 3-406, comments 1-2.

¹⁹⁹ UTAH CODE ANN. § 70A-3-407 (Supp. 1965).

²⁰⁰ HAWKLAND, COMMERCIAL PAPER 101 (1959).

²⁰¹ UTAH CODE ANN. § 70A-3-501(3) (Supp. 1965).

²⁰² See UTAH CODE ANN. §§ 70A-3-503, -504 (Supp. 1965).

²⁰³ UTAH CODE ANN. § 70A-3-503(4) (Supp. 1965).

party to whom presentment is made to demand identification, production of the instrument, and a receipt for payment.²⁰⁴

Under the NIL, presentation of an instrument was required to be made within a "reasonable time." This period was usually one day after receipt²⁰⁵ if the check was payable in the same city as the holder was located. The specified period was unrealistic. The code provides that, in the case of an uncertified check payable in the United States and not a draft drawn by a bank, a reasonable time for presentment with respect to liability of the drawer is thirty days after date or issue, and, with respect to the liability of an endorser, seven days after endorsement.²⁰⁶ The greater latitude allowed is more realistic, and, when the problem arises, should avoid technical claims of lack of timely presentment. Conceivably, a reasonable time could be longer than the thirty-day, seven-day period provided in the code if the circumstances of the transfer and presentment and banking usage dictate. Thus, the code has additional built-in flexibility.²⁰⁷

One of the difficult problems which arose under the NIL was the possible double liability of a party in a situation wherein a holder makes presentment of an instrument and the person to whom it is presented had knowledge of a third party's claim under the instrument. The problem arose because of the ambiguity of section 88 of the NIL which requires payment in "due course." The code provides that a party may pay an instrument, even though he has notice of a claim of a third person, unless the third person either supplies indemnity, or enjoins payment or satisfaction.²⁰⁸ There are exceptions to the above rule. A party may not, in bad faith, pay a holder who acquired the instrument by theft or who holds it through one who acquired it by theft, unless the holder has the rights of a holder in due course. A second exception provides that a party who pays or satisfies the holder of an instrument, who has immediately before taken the instrument subject to a restrictive indorsement, is not discharged of liability, if payment is not in the manner consistent with the terms of the restrictive indorsement. Thus, the code does away with the concept of "payment for honor" and adopts the position that a payor is not required to obey a stop-order request of an indorser.²⁰⁹ This solution is preferable to the complicated and uncertain law of *jus tertii* that was built around the NIL.

Although many of the changes in the law of commercial paper are not of striking importance, the code has done much to improve the uncertainty and unnecessary complexity that existed under the NIL. If nothing else, the NIL has now been streamlined into a workable law of commercial paper more suited to the needs of a modern society.

²⁰⁴ UTAH CODE ANN. § 70A-3-505 (Supp. 1965).

²⁰⁵ See BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 186, at 1296-1302 (7th ed. Beutel 1948).

²⁰⁶ UTAH CODE ANN. § 70A-3-503(2) (Supp. 1965).

²⁰⁷ *Ibid.*, Durnell v. Sowden, 5 Utah 216, 14 Pac. 334 (1887), ruled that the determination of the reasonableness of any delay in presentment was a question of law.

²⁰⁸ UTAH CODE ANN. § 70A-3-603 (Supp. 1965).

²⁰⁹ UNIFORM COMMERCIAL CODE § 3-603, comment 3.

ARTICLE 4. BANK DEPOSITS AND COLLECTIONS

The provisions of article 4²¹⁰ are generally new to Utah statutory law, although the portions of the article dealing with bank-customer relationships had some foundation in previous Utah legislation.²¹¹ The article does not purport to deal with banks in a regulatory manner, but only to provide a framework within which the commercial relationships between banks and between banks and their customers may be carried on.

The provisions of article 4 may be generally varied by agreement, subject to the general obligation of good faith.²¹² Furthermore, the provisions of Federal Reserve Board regulations and operating letters take precedence over the code.²¹³ Of primary importance is the fact that local clearing-house rules are deemed "agreements" between parties to a transaction under article 4, even though not expressly assented to, and thereby supersede the code where conflict exists.²¹⁴ However, the official comment makes it clear that the exception for local clearing-house rules is not to be taken as carte-blanche authority to rewrite the law and totally dispense with article 4. The right of local clearing houses to make departures from the code must be based on previous customs and exceptions especially necessary to accommodate local business needs.²¹⁵

A. Receipt of Items

Under the code, banks are allowed to fix an afternoon hour of 2:00 p.m. or later as a cutoff period for handling items and making account entries. Items received after 2:00 p.m. are treated as received the next business day. Consequently, banks can gain additional time within which to process items received after the arbitrary cutoff period.²¹⁶ In addition, the code grants a collecting bank making a collection one additional banking day in which to make a collection in the absence of an express prohibition by any party. The extension does not operate to discharge a secondary party.²¹⁷ If a collecting bank fails to use ordinary care, it may be liable to the depositor in the amount of the item reduced by the amount which could not have been realized by the use of ordinary care.²¹⁸ Therefore, if a collecting bank delays action on an item beyond

²¹⁰ UTAH CODE ANN. tit. 70A, ch. 4 (Supp. 1965).

²¹¹ UTAH CODE ANN. tit. 7, ch. 3 (1953).

²¹² UTAH CODE ANN. § 70A-4-103(1) (Supp. 1965). It has been ruled that this precludes a total prohibition against stop orders. *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954) (dictum).

²¹³ These would be principally regulations G and J issued by the Federal Reserve Board. Cf. 38 Stat. 251 (1913), as amended, 12 U.S.C. § 221 (Supp. III, 1962).

²¹⁴ UTAH CODE ANN. § 70A-4-103(2) (Supp. 1965).

²¹⁵ UNIFORM COMMERCIAL CODE § 4-103, comment 3 states in part:

Subsection (2) in recognizing clearing house rules as a means of preserving flexibility continues the sensible approach indicated in the cases. Included in the term "clearing houses" are county and regional clearing houses as well as those within a single city or town. There is, of course, no intention of authorizing a local clearing house or a group of clearing houses to rewrite the basic law generally. The term "clearing house rules" should be understood in the light of functions the clearing houses have exercised in the past.

²¹⁶ UTAH CODE ANN. § 70A-4-107 (Supp. 1965).

²¹⁷ UTAH CODE ANN. § 70A-4-108 (Supp. 1965). Exceptional circumstances will excuse the delay of the collecting bank, even beyond the one-day period.

²¹⁸ UTAH CODE ANN. § 70A-4-103(5) (Supp. 1965).

the period provided for collection by the code, and, as a consequence, the depositor has his check dishonored upon presentment to the drawee bank, the collecting bank may be liable for the full amount of the item if the check would have been honored on presentment had ordinary care been used and the prescribed time limits followed. However, a collecting bank is not liable for the misconduct or insolvency of another bank in the collection process, so long as the choice of the second collecting agent is based upon ordinary care.²¹⁹

The code draws a distinction between payment of an item and provisional credit for an item given by the payor bank. Provisional credit must be given to a presenting bank before midnight on the day of receipt by the payor bank.²²⁰ This is to be distinguished from the midnight deadline, the time within which the bank must finally act. "Midnight deadline" is defined by the code as midnight on the next day following the banking day on which the payor bank receives the item.²²¹ The payor bank has a right to revoke any provisional credit given at any time before its "midnight deadline," or before final payment is made. If a payor bank fails to give provisional credit to the presenting bank by midnight of the banking day on which the check is received, the payor bank is liable to the depositor for the amount of the check.²²² Additionally, retention of the item beyond the "midnight deadline" would also make the payor bank liable to its customer as well as the collecting bank.²²³ Revocation of provisional credit may be made by returning the item or by sending written notice of dishonor if the item is otherwise unavailable for return or is held for protest.²²⁴ Therefore, it is imperative that a payor bank finally process all items received for payment not later than its midnight deadline.

Final payment, as distinct from provisional payment or provisional credit, can occur prior to the midnight deadline if proper steps are taken. Final payment occurs when any of the following happens first: (1) the bank pays cash; (2) the item is settled without reservation of a right to revoke or where otherwise the code provides no right; (3) the process of posting is completed; or (4) provisional settlement for an item is made and not revoked in proper time.²²⁵

The concept of "final payment" has been substituted for the NIL's "doctrine of acceptance."²²⁶ The code also allows a collecting bank, that has made provisional settlement with a customer because it is unable to obtain honor of the instrument through no fault of its own, to revoke the settlement given and to charge back the amount of any credit given for the item to the customer's account, even if it is unable to return the item by its midnight deadline. How-

²¹⁹ UTAH CODE ANN. § 70A-4-202(3) (Supp. 1965). This adopts the so-called Massachusetts rule. UNIFORM COMMERCIAL CODE § 4-202, comment 4.

²²⁰ UTAH CODE ANN. § 70A-4-302(a) (Supp. 1965).

²²¹ UTAH CODE ANN. § 70A-4-104(1)(h) (Supp. 1965).

²²² UTAH CODE ANN. § 70A-4-302(a) (Supp. 1965).

²²³ *Ibid.*

²²⁴ UTAH CODE ANN. § 70A-4-301(1)(a), (b) (Supp. 1965).

²²⁵ UTAH CODE ANN. § 70A-4-213 (Supp. 1965).

²²⁶ UNIFORM COMMERCIAL CODE § 4-213, comment 2.

ever, there is no right to revoke or charge back where there otherwise has been a final payment of the item.²²⁷

The code continues the rule of *Price v. Neil*,²²⁸ which imposes liability upon the drawee bank for honoring a forged signature of its drawer. However, if one of the prior parties in the chain of negotiations had knowledge of the forgery, the bank may recover from such party under the theory of breach of warranty.²²⁹

B. Liability of Bank to Depositor

The code allows a bank to charge against its customer's account any item which is otherwise properly payable, even though the charge creates an overdraft.²³⁰ This provision adopts the case rulings under the NIL, under which a bank has been allowed to recover on the basis of unjust enrichment on the theory of a loan.²³¹

A bank is allowed to pay an item to the original tenor of the item even if it has been altered, and, if the item was originally incomplete, the bank may pay to the completed tenor of the item absent knowledge that it was improperly completed.²³²

A bank is liable to its customer for all damages proximately caused by the wrongful dishonor of an item, including damages resulting from arrest, prosecution, or other consequential damages.²³³ Damages in a nominal amount are not allowed for technical breach of a bank's obligation, nor are damages allowed on the theory that dishonor may be defamation per se for a businessman which would give him a right to collect substantial damages.²³⁴ Only those damages actually proved and necessarily incurred as the result of the dishonor are recoverable.

The code grants a bank's customer the right to stop payment of any item payable from his account, if the notice to stop payment is received at such time and in such a manner as to afford the bank a reasonable opportunity to act upon it.²³⁵ However, a stop-payment order is too late if the bank has certified or accepted the item, paid it in cash, settled the item without right of revocation, or completed the process of posting.²³⁶ The burden of establishing a loss resulting from the payment of an item contrary to a stop-payment order is upon the customer.²³⁷

²²⁷ UTAH CODE ANN. § 70A-4-212 (Supp. 1965); cf. CLARKE, BAILEY & YOUNG, *BANK DEPOSITS AND COLLECTIONS* 101, 102 (3d ed. 1959).

²²⁸ 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

²²⁹ UTAH CODE ANN. § 70A-4-207 (Supp. 1965).

²³⁰ UTAH CODE ANN. § 70A-4-401(1) (Supp. 1965).

²³¹ Annot., 12 A.L.R. 360 (1921).

²³² UTAH CODE ANN. 70A-4-401(2) (Supp. 1965).

²³³ UTAH CODE ANN. § 70A-4-402 (Supp. 1965).

²³⁴ UNIFORM COMMERCIAL CODE § 4-402, comment 3; see Penney, *A Summary of Articles 3 and 4 and Their Impact in New York*, 48 CORNELL L.Q. 47, 85 (1962).

²³⁵ UTAH CODE ANN. § 70A-4-403(1) (Supp. 1965).

²³⁶ UTAH CODE ANN. § 70A-4-303(1) (Supp. 1965).

²³⁷ UTAH CODE ANN. § 70A-4-403(3) (Supp. 1965).

Utah departed from the provisions of the official draft of the code that allowed an oral stop-payment order to be binding for fourteen days.²³⁸ Provisions for an oral stop-payment order encountered substantial objection from banks and bank counsel. Consequently, the Utah provision requires that a stop-payment order be written and that it specifically describe the check upon which payment is to be stopped. Previous legislation in Utah relating to stop-payment orders was repealed.²³⁹ A drawee bank paying in violation of a stop-payment order is expressly entitled to subrogation against the person who is the recipient of the payment in order to prevent unjust enrichment.²⁴⁰ Such a claim was subject to conflicting views under the NIL.

Whether the requirement of a written stop-payment order will be effective to protect banks is open to some question. Banks that acknowledge receipt of an oral stop-payment order and indicate to their customers that they will endeavor to stop the check may be estopped from demanding a writing, in which event an oral stop-payment order may be construed to remain open for a reasonable time, thereby subjecting the bank to a more onerous obligation than the original fourteen-day provision of the code. The courts have been reluctant to exculpate banks from liability for the failure to comply with stop-order requests.²⁴¹

The prior law relating to stale checks²⁴² has been repealed by the enactment of the code. The code provides that a bank has no obligation to pay a check older than six months unless it is certified, but it may pay the instrument if acting in good faith.²⁴³ The determination of whether a stale check will be paid is within the sound discretion of the bank. Whether payment may be made by the bank after a previously given stop-payment order has expired is unanswered by the code. It has been suggested that, when the bank pays in good faith, the mere fact that a previous, unrenewed stop-payment order has been given should not burden it with liability. Although this seems logical, the issue is not clear.²⁴⁴

The code provides that neither the death nor incompetence of a customer revokes the authority of a bank to accept, pay, collect, or account for an item, until the bank knows of the fact of death or adjudication of incompetence and has a reasonable time to act thereon.²⁴⁵ If a bank has assurance of the death of its customer, it may still pay or certify checks drawn prior to the date of

²³⁸ UTAH CODE ANN. § 70A-4-403(2) (Supp. 1965).

²³⁹ UTAH CODE ANN. § 7-3-48 (1953) was repealed by § 70A-10-102 (Supp. 1965).

²⁴⁰ UTAH CODE ANN. § 70A-4-407 (Supp. 1965).

²⁴¹ In *Bohlig v. First Nat'l Bank*, 233 Minn. 523, 48 N.W.2d 445 (1951), the court ruled that the bank had waived its right to require a written stop-payment order when the bank did not insist on such formality and its only basis in not stopping payment was a claim that the notice came too late. See BRADY, *BANK CHECKS* § 13.5, at 425 (3d ed. 1962).

²⁴² UTAH CODE ANN. § 7-3-49 (1953).

²⁴³ UTAH CODE ANN. § 7-3-49 (1953), was repealed by § 70A-10-102 (Supp. 1965) and was effectively replaced by § 70A-4-404 (Supp. 1965).

²⁴⁴ CLARKE, BAILEY & YOUNG, *op. cit. supra* note 227, at 170; compare *Goldberg v. Manufacturers Trust Co.*, 199 Misc. 167, 102 N.Y.S.2d 144 (Munic. Ct. 1951), with *Feller v. Manufacturers Trust Co.*, 4 App. Div. 2d 675, 163 N.Y.S.2d 512 (1957).

²⁴⁵ UTAH CODE ANN. § 70A-4-405 (Supp. 1965).

death, unless it is ordered to stop payment by a person claiming an interest in the account. Other provisions of Utah law allowing a bank to ignore a claim of a third party in the absence of a judicial restraint²⁴⁶ do not affect the code provisions dealing with the death or incompetence of a customer.²⁴⁷

The code requires a bank customer to use reasonable care and timely action in examining his bank statement and returned items to discover any forgery or alteration. The customer also must notify the bank promptly after discovering any defect.²⁴⁸ A customer who fails to notify the bank promptly of an unauthorized signature or alteration cannot assert his right against the bank, if the bank would otherwise suffer a loss. However, if the bank is negligent in paying any forged or altered item, the failure of the customer to notify the bank promptly does not preclude the customer's recovering his loss from the bank.²⁴⁹

In any event, a customer must, within one year of any statement or return, report any unauthorized signature or alteration or he is precluded from asserting against the bank any claim arising from such alteration. In the case of an unauthorized indorsement, the reporting period is extended to three years.²⁵⁰ These provisions are not statutes of limitations and do not require that court action be brought within the period, but require only that notice be given.²⁵¹ The provisions of current Utah law relating to accounts stated²⁵² have not been affected by the adoption of the code.

As can be seen, much of article 4 is merely a restatement of the previously existing law defining the relationship of a bank to its customer. Some of the duties and obligations have been modified, and some of the liabilities have been made more explicit. The ultimate effect should be a substantial benefit to banks and their customers.

ARTICLE 5. LETTERS OF CREDIT

Prior to the enactment of the Uniform Commercial Code, Utah, like most states, had no specific statutory or case law dealing with letters of credit. The law applied when disputes arose was based primarily upon bankers' customs and accords or upon the NIL wherever it was analogous.²⁵³ The primary bankers' accord was the Uniform Customs and Practice for Commercial Documentary Credits (hereinafter referred to as UCP) fixed by the thirteenth Congress of the International Chamber of Commerce. These customs were based on bank practices and did not have uniform application or complete commercial acceptance.²⁵⁴ Because of the growing use of credits and the need for some guidelines, the drafters of the code included the provisions on letters of credit.

²⁴⁶ UTAH CODE ANN. § 7-3-50 (1953).

²⁴⁷ UTAH CODE ANN. § 70A-4-405(2) (Supp. 1965).

²⁴⁸ UTAH CODE ANN. § 70A-4-406(1) (Supp. 1965).

²⁴⁹ UTAH CODE ANN. § 70A-4-406(3) (Supp. 1965).

²⁵⁰ UTAH CODE ANN. § 70A-4-406(4) (Supp. 1965).

²⁵¹ CLARKE, BAILEY & YOUNG, *op. cit. supra* note 227, at 165.

²⁵² UTAH CODE ANN. §§ 7-3-50, -51 (1953).

²⁵³ N.Y. Comm. on Uniform State Laws, Report 165 (Oct. 2, 1961).

²⁵⁴ Mentschicoff, *Letters of Credit: The Need for Uniform Legislation*, 23 U. CHI. L. REV. 571 (1956).

Article 5²⁵⁵ does not purport to be a comprehensive, complete, detailed codification of the law relating to letters of credit, but it does establish the "basic structure" for letter-of-credit transactions.²⁵⁶

No particular form of phrasing is required for a letter of credit, but a credit must be in writing and signed by the issuer. A confirmation of a credit must also be in writing and signed by the confirming bank. If either the credit or the confirmation is modified, the modification must be signed by the issuer or the confirming bank.²⁵⁷ These requirements are in accord with standard commercial practice.²⁵⁸ A telegram may be sufficient as a signed writing for a credit or a confirmation, if the sender is identified by an authorized code or by an advice of credit.

The code departs from present law by making consideration unnecessary to sustain a credit.²⁵⁹ Prior case law had been very liberal in finding consideration for credits, such as implied promises.²⁶⁰ Hence, the provisions making consideration unnecessary will have little impact on credit dealings.

A letter of credit may be either revocable or irrevocable. As a practical matter, there is very little commercial use of revocable letters of credit.²⁶¹ Although the code is silent in determining when a credit is revocable or irrevocable, the UCP provides for irrevocability in the absence of a clear stipulation to the contrary,²⁶² and case law supports the rule that irrevocability of credits is presumed.²⁶³ The code does provide that, once an irrevocable credit is established for a customer, it can be modified or revoked only with the consent of the customer, or, if established for a beneficiary, can be modified or revoked only on his consent.²⁶⁴ A revocable credit may be modified or revoked without notice or consent.²⁶⁵

An advising bank assumes no obligation to honor drafts or credits, but is responsible only for its advice. A confirming bank, however, has the rights and obligations of an issuer.²⁶⁶ Any errors in transmission, reasonable translation, or interpretation are borne by the customer rather than the issuer in the absence of a contrary agreement.²⁶⁷ This accords with current bank practice.²⁶⁸

The obligation of the issuer of the credit to its customer is one of good faith and observance of bank custom. There is no liability for the performance of

²⁵⁵ UTAH CODE ANN. tit. 70A, ch. 5 (Supp. 1965).

²⁵⁶ Mentschicoff, *Highlights of the Uniform Commercial Code*, 27 MODERN L. REV. 180, 183 (1964); Utah Bar Comm. on the UCC, Notes on Article 5, at 1 (May 9, 1964).

²⁵⁷ UTAH CODE ANN. § 70A-5-104 (Supp. 1965).

²⁵⁸ See Harfield, *Code Treatment of Letters of Credit*, 48 CORNELL L.Q. 92, 98 (1962).

²⁵⁹ UTAH CODE ANN. § 70A-5-105 (Supp. 1965).

²⁶⁰ *Evansville Nat'l Bank v. Kaufmann*, 94 N.Y. 273, 279-80 (1883).

²⁶¹ Mentschicoff, *How to Handle Letters of Credit*, 19 BUS. LAW. 107, 109 (1963).

²⁶² Utah Bar Comm. on the UCC, Notes on Article 5, at 2 (May 9, 1964).

²⁶³ See *American Steel Co. v. Irving Nat'l Bank*, 266 Fed. 41 (2d Cir. 1920), cert. denied, 258 U.S. 617 (1921).

²⁶⁴ UTAH CODE ANN. § 70A-5-106(2) (Supp. 1965).

²⁶⁵ UTAH CODE ANN. § 70A-5-106(3) (Supp. 1965).

²⁶⁶ UTAH CODE ANN. § 70A-5-107 (Supp. 1965).

²⁶⁷ *Ibid.*

²⁶⁸ N.Y. Comm. on Uniform State Laws, Report 170 (Oct. 2, 1961).

any underlying or allied contract.²⁶⁹ The issuer need only examine documents presented under a credit to see if they are regular on their face and comply with the credit. There is no requirement that the issuer assume liability for any unguenuine or falsified document. A bank issuing a letter of credit has no reasonable way of detecting forgeries in the chain of dealings and is, therefore, not held to the same standard as when it is handling its customer's checks.

A beneficiary who transfers or presents a documentary draft or demand for payment warrants to all interested parties that he has complied with the necessary conditions of the credit. This warranty is in addition to other warranties that may be imposed by the code under other articles.²⁷⁰ On the other hand, a negotiating, advising, confirming, collecting, or issuing bank which presents or transfers a demand for payment under a credit makes only the warranties of a collecting bank under article 4,²⁷¹ or if it transfers a document, it warrants only the matters warranted by an intermediary under articles 7 and 8.²⁷²

A bank to which a documentary draft or demand for payment under a letter of credit is presented may, without dishonoring the draft, defer honor to the close of the third banking day following receipt of the documents and further delay honor if the presenter expressly or impliedly consents thereto.²⁷³ This right of the bank to delay honor is generally new to credit law.²⁷⁴ The failure to honor the instrument during the required time operates as a dishonor of the instrument. Failure to honor a partial credit constitutes an anticipatory breach as to other parts of the credit not presented.²⁷⁵

A bank seeking honor of a credit may give indemnity to secure honor. This practice is in accord with the European practice of habitually giving indemnity.²⁷⁶ The use of indemnity, although not as common in American practice, is recognized as proper under general case law.²⁷⁷ Honor is mandatory if presentment is proper, irrespective of breach in the underlying contract, and the issuer who honors under these circumstances may obtain payment from his customer.²⁷⁸

The code recognizes the concept of "back-to-back financing." The right to draw under a credit can be transferred or assigned only when expressly designated as transferable or assignable. However, an assignment of proceeds may take place regardless of whether the credit is assignable. This should facilitate ease and flexibility in multitransaction financing covered by a single letter

²⁶⁹ UTAH CODE ANN. § 70A-5-109 (Supp. 1965). This is in accord with the rule in the landmark case of *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925).

²⁷⁰ UTAH CODE ANN. § 70A-5-111(1) (Supp. 1965).

²⁷¹ UTAH CODE ANN. § 70A-5-111(2) (Supp. 1965); *cf.* UTAH CODE ANN. § 70A-4-207 (Supp. 1965).

²⁷² UTAH CODE ANN. §§ 70A-7-508, 70A-8-306 (Supp. 1965).

²⁷³ UTAH CODE ANN. § 70A-5-112 (Supp. 1965).

²⁷⁴ Mentschicoff, *supra* note 261, at 110.

²⁷⁵ UNIFORM COMMERCIAL CODE § 5-112, comment 1.

²⁷⁶ UTAH CODE ANN. § 70A-5-113 (Supp. 1965); Harfield, *supra* note 258, at 103.

²⁷⁷ See *O'Connor v. Bankers Trust Co.*, 159 Misc. 920, 289 N.Y. Supp. 252 (Sup. Ct. 1936), *aff'd*, 278 N.Y. 649, 16 N.E.2d 302, 1 N.Y.S.2d 861 (1938).

²⁷⁸ UTAH CODE ANN. § 70A-5-114 (Supp. 1965).

of credit,²⁷⁹ since the proceeds may be assigned and may thus form the basis of a collateral financing arrangement.

The addition of the provisions relating to letters of credit should be a substantial benefit to the commercial law of Utah. The use of letters of credit as a financing device in interstate transactions is increasing. The code provides guidelines for using these instruments without attempting to be so specific and authoritarian as to impede the commercial use of credits or so vague as to make the use obscure and risky with the result that other forms of financing are preferred.²⁸⁰

ARTICLE 6. BULK TRANSFERS

Article 6 of the code replaces the previous Utah law dealing with bulk sales.²⁸¹ The legislature, in repealing the prior law adopted in 1923, returns to a statutory framework similar to the bulk-sales provisions enacted in Utah in 1905²⁸² by restricting the bulk transfer to a more limited number of transactions.

Under the code, a "bulk transfer" is a "transfer in bulk . . . not in the ordinary course of the transferor's business of a major part" of his "materials, supplies, merchandise or other inventory."²⁸³ The code does not deal with the transfer of equipment used in business except where a substantial part of the equipment is sold as a part of a transfer of inventory.²⁸⁴ Businesses not engaged in the sale of merchandise from stock need not comply with the bulk-transfer provisions.²⁸⁵ Barber shops, hotels, pool halls, and similar businesses that were covered by the previous Utah bulk-sales law²⁸⁶ are now excluded. The theory behind the code position is that unsecured merchants usually extend credit on the basis of inventory rather than equipment, since the latter is often subject to security interests which would preclude its use in satisfying general creditor claims. Inventory, however, is usually not so encumbered and thus provides the basis for unsecured credit. As a result, transfer of inventory is the primary area of operation of the code's bulk-transfer provisions.²⁸⁷

By the use of the words "major part," the code substantially improves previous Utah law wherein the bulk-sales provisions were applicable "if any portion" of property, furniture, fixtures, equipment, etc., of a business was sold.²⁸⁸ The term "major part" probably refers to a sale of more than fifty per cent of

²⁷⁹ UTAH CODE ANN. § 70A-5-116 (Supp. 1965); Harfield, *Secondary Uses of Commercial Credits*, 44 COLUM. L. REV. 899, 907-09, 912-13 (1944).

²⁸⁰ Ufford, *Transfer and Assignment of Letters of Credit Under the Code*, 7 WAYNE L. REV. 263 (1960).

²⁸¹ UTAH CODE ANN. tit. 25, ch. 2 (1953).

²⁸² Utah Laws 1905, ch. 90, §§ 1-5, at 103-05; Swanson v. De Vine, 49 Utah 1, 160 Pac. 872 (1916). The original bulk-sales act, passed in 1901, was declared unconstitutional in Block v. Schwartz, 27 Utah 387, 76 Pac. 22 (1904).

²⁸³ UTAH CODE ANN. § 70A-6-102(1) (Supp. 1965).

²⁸⁴ UTAH CODE ANN. § 70A-6-102(2) (Supp. 1965).

²⁸⁵ UTAH CODE ANN. § 70A-6-102(3) (Supp. 1965); accord, Swanson v. De Vine, 49 Utah 1, 160 Pac. 872 (1916).

²⁸⁶ See UTAH CODE ANN. § 25-2-1 (1953).

²⁸⁷ HAWKLAND, SALES & BULK SALES 64 (1958).

²⁸⁸ UTAH CODE ANN. § 25-2-2 (1953).

the inventory of a business.²⁸⁹ In addition, where two or more buyers acting at about the same time buy portions of the business and neither buyer alone is purchasing a major part or fifty per cent, but their total purchase constitutes a major part or fifty per cent of the inventory of the business, the bulk-transfer provisions of the code apply. The same can be said where a seller operates more than one business establishment and sells the major portion of the inventory of a single establishment. The bulk-transfer provisions are applicable in cases of chain stores²⁹⁰ when one store sells its inventory, although it is less than fifty per cent of the inventory of the whole enterprise.

The code exemptions from the bulk-transfer law are broader and more specific than those of the previous statute.²⁹¹ Transfers for security purposes — such as mortgages and the like, general assignments for the benefit of creditors,²⁹² transfers in realization of a security interest, sales by executors or judicial process, sales in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation where notice is sent to the creditors of the corporation pursuant to a court or administrative order, transfers to a person maintaining a known place of business in the state of Utah who becomes bound to pay the debts of the transferor in full and gives notice to that fact, transfers to a new business enterprise organized to take over and continue the previous enterprise if public notice of the transaction is given, and transfers of property which are exempt from execution — are all excluded from the bulk-transfer provisions.²⁹³

The transferee must obtain from the transferor a list of his existing creditors. Thereafter, the parties must prepare a schedule of the property transferred that is sufficient to identify it. The list of creditors and the schedule of property to be transferred must be preserved by the transferee for six months following the transfer. The list and schedule are subject to examination and copying at any reasonable hour by any creditor of the transferor. The transferee, however, may file the list and schedule in the office of the county recorder and thereby avoid having to keep the list and schedule of property for inspection by the creditors of the transferor.²⁹⁴ The list of creditors must be signed and sworn to by the transferor or his agent and must contain the names and business addresses of all creditors of the transferor with the amounts, when known, of any indebtedness and the names of all persons who are known to the transferor to have asserted claims against him, even though the claims are disputed. The responsibility for the completeness and accuracy of the list of creditors rests on the transferor and the transfer is not rendered ineffective by errors or omissions, unless the transferee has knowledge of such defects.²⁹⁵

²⁸⁹ Lamey, *How To Handle a Bulk Transfer*, 19 BUS. LAW. 67, 68 (1963).

²⁹⁰ *Id.* at 68-69.

²⁹¹ Compare UTAH CODE ANN. § 25-2-5 (1953), with UTAH CODE ANN. § 70A-6-103 (Supp. 1965).

²⁹² See *Branham v. Jackson*, 12 Utah 2d 399, 367 P.2d 187 (1961).

²⁹³ UTAH CODE ANN. § 70A-6-103 (Supp. 1965).

²⁹⁴ UTAH CODE ANN. § 70A-6-104 (Supp. 1965).

²⁹⁵ *Ibid.*

The transferee must give notice to the creditors of the transferor within ten days prior to the time he takes possession of the goods or prior to payment, whichever occurs first.²⁹⁶

Two kinds of notices are required of the transferee, depending upon the circumstances. If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on the question, a long form of notice must be sent indicating: that a bulk transfer is to be made; the names and business addresses of the transferor and the transferee, including other business names and addresses used by the transferor within the three years preceding so far as they are known to the transferee; whether or not the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their claims; the location and general description of the property to be transferred, including an estimate of the transferor's total debts; the address where the schedule of property and the list of creditors may be inspected; whether the transfer is for new consideration, and, if so, the amount of such consideration and the time and place of payment of the proceeds. If the debts are to be paid by the transferee, a short form of notice is authorized. Notice must be delivered personally or sent by registered or certified mail to all persons named on the list of creditors and to all persons who, within the knowledge of the transferee, assert claims against the transferor.²⁹⁷

In Utah, an optional provision of the code was adopted that imposes a duty upon the transferee to assure that consideration received for the transfer is applied so far as necessary to the transferor's debts that are shown on the list of creditors or are filed in writing at the place provided in the notice within thirty days after the mailing of the notice.²⁹⁸ Alternatively, the transferee may within ten days after taking possession of the goods pay the consideration into the district court of the county where the transferor had his principal place of business. Thereafter, a notice may be given to creditors to file their claims with the court.²⁹⁹ The provision requiring application of the proceeds by the transferee is not unique to Utah law.³⁰⁰ However, the code does impose a more stringent obligation than was the obligation under prior law,³⁰¹ *i.e.*, to see that the proceeds which constitute the consideration for the transfer are in fact applied to the satisfaction of creditors' claims.

Only creditors of the transferor who hold claims based on transactions or events occurring before the bulk transfer are entitled to notice and to have their obligations satisfied from the proceeds.³⁰² If the transferee fails to comply with the bulk-transfer provision, a purchaser of any of the property from the

²⁹⁶ UTAH CODE ANN. § 70A-6-105 (Supp. 1965). There is no provision in the code that makes a false affidavit of a transferor perjury. However, the general provisions of the penal code would apply. UTAH CODE ANN. §§ 76-45-1 to -8 (1953).

²⁹⁷ UTAH CODE ANN. § 70A-6-107 (Supp. 1965).

²⁹⁸ UTAH CODE ANN. § 70A-6-106(1) (Supp. 1965).

²⁹⁹ UTAH CODE ANN. § 70A-6-106(4) (Supp. 1965).

³⁰⁰ UTAH CODE ANN. § 25-2-2 (1953).

³⁰¹ Compare UTAH CODE ANN. § 25-2-2 (1953), with UTAH CODE ANN. § 70A-6-107 (Supp. 1965).

³⁰² UTAH CODE ANN. § 70A-6-109 (Supp. 1965).

transferee who pays no value or who has notice of noncompliance takes subject to the defect, and the property may be subject to creditors' levy. However, one who purchases for value, in good faith and without notice, takes free of any defects for failure to comply with the bulk-transfer provisions.³⁰³

A bulk transfer is subject to article 6, even if the sale is by auction. The auctioneer is placed in the position of the transferee and must obtain a list of creditors and a schedule of the property to be sold, as well as give notice to creditors of the auction either personally or by certified mail ten days before the sale occurs.³⁰⁴ If the auctioneer fails to perform any of his duties (including ensuring that the net proceeds of the auction are applied to the creditors' claims), the title to property purchased by third persons at the auction is not void, but the auctioneer is liable to the creditors of the transferor for the sums owed them up to the amount of the net proceeds of the auction.³⁰⁵ The provision subjecting transfers by auction to the bulk-transfer provisions is new to Utah law.

The official draft of the code provides that an action or levy under the provisions of article 6 must be brought within six months after transfer.³⁰⁶ As enacted in Utah, the code requires that an action predicated upon the bulk-transfer provisions be brought within six months of the transfer, but, in addition, levy against the goods may be taken any time within six months after judgment.³⁰⁷

³⁰³ UTAH CODE ANN. § 70A-6-110 (Supp. 1965). This is in accord with general law. *Anderson v. Roberts*, 18 Johns. 515 (N.Y. Ct. Trial Impeach. 1820).

³⁰⁴ UTAH CODE ANN. § 70A-6-108 (Supp. 1965).

³⁰⁵ *Ibid.*

³⁰⁶ UNIFORM COMMERCIAL CODE § 6-111.

³⁰⁷ UTAH CODE ANN. § 70A-6-111 (Supp. 1965). This provision became garbled in the legislative process, but the intention was to liberalize the six-month provision of the code by allowing a six-month period after judgment in which to levy against the goods of an illegal bulk transfer. Utah Bar Comm. on the UCC, Notes on Article 6, at 7 (May 30, 1964).

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NOTES

Third-Party Liability Under Workmen's Compensation Law

Prior to the adoption of workmen's compensation legislation, if an employee, injured in the course of his employment, wanted a remedy against his employer he would have to bring a tort action and prove that the employer was guilty of negligence.¹ Few of these tort actions against employers succeeded,² however, because, in addition to the requirement of proving fault on the part of the employer, the employee's case was subject to the defenses of contributory negligence, assumption of risk, and the fellow-servant rule.³ With the enactment of workmen's compensation legislation, common law principles were disregarded and statutory liability was substituted for employers who qualified under the act. To qualify, an employer was required to provide compensation insurance for his employees in return for which he was given immunity from the possibility of a suit for damages by his employees who were injured on the job; and an employee, in return for foregoing his right to sue the employer for damages, was given a modest but guaranteed amount of compensation and was relieved of the requirement of proving fault on the part of the employer and absence of contributing personal fault.⁴ This *quid pro quo* concept, based upon a mutual exchange of rights and liabilities between employers and employees, is considered to be a fundamental element in workmen's compensation theory.⁵

In typical workmen's compensation cases, an employee who is injured on the job files a claim with the industrial commission and receives his compensation award summarily with no court action involved. Whenever court action is required, it usually involves a determination of whether a particular claimant

¹ See HOROVITZ, *Current Trends in Basic Principles of Workmen's Compensation*, in *CURRENT TRENDS IN WORKMEN'S COMPENSATION* 466-67 (1947). See generally 1 LARSON, *WORKMEN'S COMPENSATION* §§ 4.10-.40 (1952) [hereinafter cited as LARSON].

² It is estimated that 80% of these cases were lost or uncompensated. HOROVITZ, *op. cit. supra* note 1, at 467 & n.3.

³ For an enlightening discussion of all three common law defenses, see the court's opinion by Mr. Justice Rutledge in *Owens v. Union Pac. R.R.*, 319 U.S. 715 (1943). The fellow-servant defense apparently was the most damaging to employees' suits because in most instances it was a co-worker, not the employer, who caused the accident. Indeed, one writer has stated, "By staying out of the factory the employer usually could avoid liability for all injuries to his men." HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 3 (1944).

⁴ See *Sanchez v. Hill Lines, Inc.*, 123 F. Supp. 42 (D.N.M. 1954); SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 27 (1954).

⁵ In an early workmen's compensation case the Washington Supreme Court stated:

Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it.

Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 Pac. 256, 258 (1916); see MALONE & PLANT, *CASES ON WORKMEN'S COMPENSATION* 65 (1963), wherein it is stated: "[T]he compromise character of compensation cannot be overemphasized." See also 2 LARSON § 72.20.

was an "employee" entitled to compensation at the time of the injury.⁶ Such cases are generally settled by the application of well-defined principles, such as whether the employer has reserved the right to control the details of the work.⁷ Problems of considerable difficulty arise, however, when the injury is contributed to or caused by a third person outside the employer-employee relationship.⁸ Most jurisdictions have statutes providing that such third persons are subject to common law tort liability to a person who is covered by the workmen's compensation act.⁹ In such cases, there is often a question of deciding who is a third person for purposes of the act — especially when the offending party is in a relationship with the claimant, such as a fellow servant or a subcontractor. Also, if a third-party situation is found to exist, there remains the problem of whether the employer should be liable to such third person for contribution or indemnity and thereby be required to participate in the payment of the damages awarded to the employee.

In attempting to determine whether certain persons are "third persons" for purposes of the workmen's compensation act, courts are usually faced with broadly worded statutes rather than specific definitions. For example, in a majority of jurisdictions the compensation statutes simply define third persons who are subject to tort liability as "third persons"¹⁰ or "persons other than the employer."¹¹ In Utah and eight other states, the act provides for a tort action by an injured employee for the wrongful acts of persons "not in the same employment."¹² A comparison of the Utah provision with those of the majority of other states suggests that the expression, "persons not in the same employment," would permit an interpretation giving immunity from tort damage suits to a broader class of persons than provisions such as "persons other than the employer."¹³ By the same token, however, that such language is broader makes its limits less susceptible of clear definition. Although there are obvious

⁶ See *Parkinson v. Industrial Comm'n*, 110 Utah 309, 172 P.2d 136 (1946); *Murch Bros. Constr. Co. v. Industrial Comm'n*, 84 Utah 494, 36 P.2d 1053 (1934); *Gibson v. Industrial Comm'n*, 81 Utah 580, 21 P.2d 536 (1913); *Larson v. Industrial Comm'n*, 80 Utah 606, 16 P.2d 219 (1932); *Stricker v. Industrial Comm'n*, 55 Utah 603, 188 Pac. 849 (1920).

⁷ See *Sommerville v. Industrial Comm'n*, 113 Utah 504, 196 P.2d 718 (1948); *Christean v. Industrial Comm'n*, 113 Utah 451, 196 P.2d 502 (1948); *Ewer v. Industrial Comm'n*, 112 Utah 538, 189 P.2d 959 (1948); *Parkinson v. Industrial Comm'n*, 110 Utah 309, 172 P.2d 136 (1946).

⁸ For a thorough and authoritative discussion, see McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-employers*, 37 TEXAS L. REV. 389, 390-95 (1959).

⁹ See *id.* at 393 & n.12 for a compendium of statutes in the fifty states.

¹⁰ *Id.* at 403 & n.49.

¹¹ *Ibid.*

¹² ARIZ. REV. STAT. ANN. § 23-1023 (1956); COLO. REV. STAT. ANN. § 81-13-8 (1953); DEL. CODE ANN. tit. 19, § 2363 (Supp. 1957); MICH. COMP. LAWS § 413.15 (Supp. 1952); N.Y. WORKMEN'S COMP. LAW § 29(1), (6) (Supp. 1957); OKLA. STAT. ANN. tit. 85, § 44 (1952); ORE. REV. STAT. § 656.154 (1953); UTAH CODE ANN. § 35-1-62 (1953); WASH. REV. CODE § 51.24.010 (1957).

¹³ This argument is based on a comparison of the language in the two statutes. Logically the term "employer" is not as broad as the phrase "in the same employment." For cases holding that fellow servants are immune from tort liability under "in the same employment" statutes, see *Callan v. Adams*, 261 App. Div. 1004, 26 N.Y.S.2d 928 (1941); *Schwartz v. Forty-second St. M. & St. N.A. Ry.*, 175 Misc. 49, 22 N.Y.S.2d 752 (Sup. Ct. 1940).

examples of persons "not in the same employment," such as a passing motorist who injures an employee engaged in street construction, other instances, such as a principal contractor injuring an employee of his subcontractor on the same project, do not present this clear dichotomy.

It is the purpose of this note to explore the prevailing views respecting third-party liability under the workmen's compensation acts of various jurisdictions and to compare their views with Utah cases and statutes. In this regard, the areas of: (1) contribution and indemnity, (2) the tort liability of fellow servants, physicians, and contractors, and (3) the effect of intentional or non-compensable injuries upon employers' liability will be discussed. Questions concerning the status of independent contractors are considered to be the most significant, and consequently will be given special emphasis.

I. CONTRIBUTION, INDEMNITY, AND SETTLEMENT

If an employee, who is injured by a third person, collects compensation and subsequently brings an action for damages against the third party, the employer or insurance carrier is entitled to indemnification to the extent of the compensation paid.¹⁴ But where the employee's injury is caused by the concurrent negligence of the employer and a third party, the third person is usually denied contribution or indemnity against the employer.¹⁵ This rule, however, has some exceptions,¹⁶ and the question of whether a third person should be able to obtain contribution or indemnity from a concurrently negligent employer has properly been characterized as the "most evenly-balanced controversy in all of compensation law."¹⁷ Indeed, the arguments both for and against allowing contribution between the employer and the third party are persuasive. For instance, employers may claim in their behalf that the net result of allowing contribution or indemnity is to require them to participate in or pay entirely a substantial tort judgment to their employees despite the "exclusive remedy" provisions of the act.¹⁸ On the other hand, the third party argues with considerable force that it is unfair to subject him to a sizable tort liability which he would be able to shift to, or share with, the employer except for the contingency that the other parties happened to be under a compensation act. A stranger to the act, the third parties claim, should not be required to subsidize the compensation system by being denied rights they would have had at common law.¹⁹

¹⁴ See *Jay v. Chicago Bridge & Iron Co.*, 150 F.2d 247 (10th Cir. 1945) (dictum); Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465, 466-74, 475 & n.81 (1958).

¹⁵ *Baird v. John McShain, Inc.*, 108 F. Supp. 553 (D.D.C. 1952); *Baltimore Transit Co. v. State ex rel. Schriever*, 183 Md. 674, 39 A.2d 858 (1944); Annot., 156 A.L.R. 460 (1945); cf. *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940).

¹⁶ *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950); *Porello v. United States*, 153 F.2d 605 (2d Cir. 1946), *aff'd in part, rev'd in part, remanded sub nom. American Stevedores v. Porello*, 330 U.S. 446 (1947).

¹⁷ 2 LARSON § 76.10, at 228.

¹⁸ See dissenting opinion in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 184, 15 N.E.2d 567, 571 (1938).

¹⁹ See 2 LARSON § 76.52, at 243, where the view is expressed that, "It is unfair to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain."

A. Contribution

The development of tort law reveals that courts of most jurisdictions, including Utah, refuse to grant contribution among concurrently negligent defendants in absence of a statute giving joint tortfeasors rights of contribution.²⁰ Furthermore, even in jurisdictions which have such statutes, third persons are almost invariably denied contribution against a concurrently negligent employer because of the "exclusive-remedy" provisions of the compensation acts.²¹ The underlying rationale for this result seems to be that contribution, if allowed at all, is allowed only between joint tortfeasors, and an employer is not a tortfeasor because the act has erased his tort liability to the plaintiff-employee.

A notable exception to the trend of refusing to recognize contribution in workmen's compensation cases, where it is otherwise available, has been made in Pennsylvania.²² The highest court of that state, in a case involving a third party and an employee, held that joinder of the employer was proper to determine whether the employer was concurrently negligent. The court held that, where the employer is found to be negligent, the statutory amount of compensation payable to the employee is to be deducted from the damages awarded against the third person. This is a commendable result, at least in jurisdictions where contribution is recognized, because it reconciles the intent of workmen's compensation laws to limit employers' liability with the right of third persons to require concurrently negligent parties to participate in payment of damages.

B. Indemnity

Indemnity is distinguished from contribution by the fact that indemnity is based on a promise, either express or implied, on the part of one party to reimburse another party for expenses incurred in certain circumstances.²³ Contribution, on the other hand, is not based on a promise, but on the belief that it is unfair to require one of several concurrent tortfeasors to bear the entire burden of the joint activity with no recourse against those who are equally culpable.²⁴ Indemnity is further distinguished from contribution in that it transfers the entire amount of liability to the one charged with a duty to indemnify, while in contribution only a proportional amount of the total damages is allocated

²⁰ See *Hardman v. Matthews*, 1 Utah 2d 110, 262 P.2d 748 (1953). See generally PROSSER, TORTS § 47 (3d ed. 1964).

²¹ Examples of such states are Maryland and North Carolina. In Maryland, rights of contribution are provided by statute. MD. ANN. CODE art. 50, §§ 16-24 (1957). However, contribution has been denied third parties because of employers' immunity. *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp.*, 193 Md. 20, 65 A.2d 304 (1949); *Baltimore Transit Co. v. State ex rel. Schrieffer*, 183 Md. 674, 39 A.2d 858 (1944); Annot., 156 A.L.R. 460 (1945). In North Carolina there is a similar statute, N.C. GEN. STAT. § 1-240 (1953), and cases in that jurisdiction also protect employers from contribution in favor of third persons. *Essick v. City of Lexington*, 232 N.C. 200, 60 S.E.2d 106 (1950); *Brown v. Southern Pac. Ry.*, 202 N.C. 256, 162 S.E. 613 (1932); *Hoover v. Globe Indem. Co.*, 202 N.C. 655, 163 S.E. 758 (1932).

²² *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940). California has apparently adopted a rule similar to Pennsylvania's. See *City of Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 23 Cal. Rptr. 43 (Dist. Ct. App. 1962); *Witt v. Jackson*, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

²³ See 2 LARSON § 76.19, at 230. See generally Note, 30 N.D.L. REV. 45 (1954); Note, 42 VA. L. REV. 959 (1956).

²⁴ See extensive citation of authorities in Note, 25 U. CHI. L. REV. 522 & n.1 (1958).

among the joint tortfeasors.²⁵ Attempts to obtain indemnity frequently arise when a dangerous instrumentality produced by a manufacturer is distributed to the consumer through a retailer. If harm results to the consumer and the retailer is held liable for damages, the retailer is usually held to be entitled to indemnity from the manufacturer for the full amount of his liability.²⁶ The theory of these cases is that the law implies a promise of indemnity from one who is primarily or actively negligent to another who is secondarily or passively negligent.²⁷

In workmen's compensation cases, third persons have experienced relatively greater success in obtaining indemnity from concurrently negligent employers than they have in obtaining contribution. The leading case allowing indemnity does so on the basis that the right to indemnity against the employer does not arise from the injury to the employee, but from a legally implied promise of indemnification from the employer, who was primarily or actively negligent, to the third party who was secondarily or passively negligent.²⁸ Other cases have allowed indemnity, not on the theory of implied promise, but from an implied duty wherein some special relationship existed between the employer and the third party, such as where the employer was the third party's bailee²⁹ or the employer was in possession of the third party's premises where the injury occurred.³⁰

Although cases allowing indemnity state that doing so does not violate the literal application of the workmen's compensation law,³¹ it is in conflict with the *quid pro quo* concept and is, therefore, inconsistent with the spirit of the legislation. In theory the workmen's compensation law strips the employer of his defenses on the question of fault, but assures him in return that the amount of recovery will be limited. Recognizing indemnity, however, allows the plaintiff-employee to recover indirectly from the employer an amount unrestricted by the compensation act on occasions in which, by chance, a third party is involved.³² Thus indirectly, the immunity provisions of the workmen's com-

²⁵ See *Pfarr v. Standard Oil Co.*, 165 Iowa 657, 146 N.W. 851 (1914). See generally PROSSER, *TORTS* §§ 47-48 (3d ed. 1964).

²⁶ *Manning Mfg. Co. v. Hartol Prods. Corp.*, 99 F.2d 813 (2d Cir. 1938); *Great Am. Ins. Co. v. "Quick-Way" Truck Shovel Co.*, 204 F. Supp. 847 (D. Colo. 1962); *Pfarr v. Standard Oil Co.*, 165 Iowa 657, 146 N.W. 851 (1914); cf. *Hoskins v. Hotel Randolph Co.*, 203 Iowa 1152, 211 N.W. 423 (1926).

²⁷ In *Pfarr v. Standard Oil Co.*, 165 Iowa 657, 146 N.W. 851 (1914), the manufacturer sold kerosene to a retailer. The kerosene was in an unsafe condition because it contained a large percentage of gasoline. A consumer bought the mixture from the retailer for use as kerosene and was injured when it exploded. The court held that the retailer could obtain indemnity from the manufacturer because the negligence of the manufacturer was active, while the negligence of the retailer was only passive.

²⁸ *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946, 952-53 (8th Cir. 1950); see 2 LARSON § 76.10.

²⁹ *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P.2d 633 (1944).

³⁰ *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938).

³¹ See *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950).

³² See dissenting opinion in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 184, 15 N.E.2d 567, 571 (1938). Theoretically, the purpose of workmen's compensation acts is to render certain rights and benefits to both employer and employee in exchange for other rights and benefits. See *Cook v. Peter Kiewit Sons*,

pensation law would be circumvented. Of course, if the employer had an express contract of indemnification with the third party, the enforcement of that contract would not be at variance with the *quid pro quo* doctrine, since the employer would thereby have bargained for liability in a transaction entirely collateral to the workmen's compensation system. Such express contracts of indemnification are enforced by courts without hesitation.³³

C. *Appraisal of Contribution and Indemnity*

The number of cases attempting to establish either contribution or indemnity and the divergent results achieved suggest that this is an area where the legislature should make specific provisions for the guidance of courts and litigants.³⁴ With respect to contribution, a desirable solution would be the Pennsylvania rule requiring a concurrently negligent employer to participate in the award of damages, but only to the extent of the compensation liability under the statute. This would accomplish the goal of giving maximum protection and doing justice to the rights of the third party while maintaining the spirit of the workmen's compensation legislation regarding statutory limits to the employer's liability. As a general rule, a right of indemnification against employers should be denied when based on implied contracts but upheld where based on an express promise. Alternatively, the legislature could incorporate the Pennsylvania rule into the field of indemnity by restricting the employer's obligation to the statutory amount of his workmen's compensation liability and, thereby, could allow indemnity without violating the *quid pro quo* theory. This would be a desirable addition to the act, since it would protect the rights of third persons and preserve the statutory limits of employer's liability.

D. *Settlement*

Under the general rule that an employer is entitled to be subrogated to his employee's claim against a third party to the extent of his compensation liability,³⁵ questions arise concerning the effect that a settlement between the third person and the employee should have upon the employer's subrogation rights. The employer's subrogation rights are protected in certain jurisdictions where it has been held that settlement between an injured employee and a negligent third party operates as a bar to a later compensation claim against the employer.³⁶ States which have reached this result generally have statutes

15 Utah 2d 20, 386 P.2d 616 (1963). Thus, the employer is left without a defense on the question of fault, but he is assured that recovery will be limited. New York Cent. R.R. v. White, 243 U.S. 188 (1917); see note 5 *supra*. Allowing indemnity—and, consequently, an indirect tort recovery against the employer—is difficult to reconcile with the purpose of workmen's compensation legislation that the employer should have a statutory limit on his liability.

³³ American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947); Clements v. Rockefeller, 189 Misc. 885, 70 N.Y.S.2d 146 (Sup. Ct. 1947); Mirsky v. Seach Realty Co., 256 App. Div. 658, 11 N.Y.S.2d 191 (1939).

³⁴ See Note, 25 U. CHI. L. REV. 522 n.1 (1958). See also 2 LARSON § 76.53.

³⁵ See Jay v. Chicago Bridge & Iron Co., 150 F.2d 247 (10th Cir. 1945) (dictum); Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465, 466-74, 475 & n.81 (1958).

³⁶ Saunders v. Cities Serv. Oil Co., 46 So. 2d 597 (Fla. 1950); Bebout v. F. L. Mendez & Co., 110 Ind. App. 28, 37 N.E.2d 690 (1941); Hart v. Traders & Gen. Ins. Co., 144 Tex. 146, 189 S.W.2d 493 (1945). *Contra*, Napier v. John P. Gorman Coal Co., 242 Ky. 127, 45 S.W.2d 1064 (1931).

requiring the injured employee to elect between receiving compensation or pursuing a remedy against the third person.³⁷ In such jurisdictions, settlement with the third party would be in lieu of the tort action, and a subsequent compensation claim would be barred because the claimant had exercised his statutory option in favor of proceeding against the third party. There may, however, be some doubt concerning this result under statutes, such as Utah's, which permit both compensation and a third-party suit.³⁸ Since an election of remedies is not required, it is arguable that it should make no difference whether compensation is demanded prior to or subsequent to an action against the third person. However, this argument should be examined in light of the fact that part of the reason for allowing third-party suits at all is to permit the employer or the employer's insurance carrier to recoup what has been paid for compensation by being subrogated to the employee's claim against the third person.³⁹ Since a release or settlement would discharge the third party's liability to the employee, it would effectively deprive the employer or insurance carrier of his subrogation rights. Therefore, to maintain a position consonant with legislative intent and to protect the rights of employers, a settlement between an employee and a third person should preclude a subsequent compensation claim against the employer in Utah.

II. FELLOW SERVANTS AND PHYSICIANS

In the absence of provisions in the compensation statute to the contrary, a fellow employee is usually regarded as a third person subject to tort liability to an injured co-worker.⁴⁰ At first impression, this result seems reasonable under the *quid pro quo* concept because the respective benefits of the act were intended to inure only to the employer who purchased the workmen's compensation insurance and the employees who were covered by it. Thus, since fellow servants have not joined in purchasing the insurance coverage, they should not be entitled to immunity. But this impression has a serious weakness. Since an employer who is liable for compensation payments is entitled to indemnification against a third person who wrongfully injures his employee,⁴¹ making a co-employee a third person subject to tort liability results ultimately in relieving the employer of the compensation liability and shifting it onto the shoulders of one of the workers. This seems unjustified under the general theory of workmen's compensation legislation — that it should provide a system of remuneration for employees at the expense of the employer. Permitting the employer to shift the financial burden again to an employee seems to violate the underlying purpose of workmen's compensation. However, when the burden is shifted to a remote third person, it is in the nature of a traditional suit at common law which does not affect the employment relationship and should proceed unfet-

³⁷ See cases cited note 36 *supra*.

³⁸ UTAH CODE ANN. § 35-1-62 (1953).

³⁹ See *Jay v. Chicago Bridge & Iron Co.*, 150 F.2d 247 (10th Cir. 1945).

⁴⁰ 2 LARSON §§ 72, 72.10; 3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 842, at 212 (perm. ed. 1943).

⁴¹ See note 14 *supra*.

tered by the act. Also, from the standpoint of the employer, there are reasons for favoring mutual immunity. For instance, if executives and higher echelon employees are subject to tort liability toward workers under them, it, as a practical matter, would probably result in the employer protecting these persons by securing liability insurance, thus denying the employer the benefits of tort immunity. Under statutes which provide that immunity extends to all persons "in the same employment," it would seem likely that fellow employees would be given immunity from suits by their co-workers;⁴² however, under statutes in which immunity is only provided for "employers," there would be little opportunity to apply the act in such a way that it gives immunity to fellow servants.⁴³ In Utah, immunity is provided with certainty because the legislature has stated in the act that "officers, agents and employees" are covered by the compensation statute.⁴⁴ This provision clearly makes fellow servants immune from third-party liability.

A physician who aggravates a compensable injury through his unskilled or negligent treatment is generally regarded as a third person, liable in tort to the employee to the extent of the additional injuries.⁴⁵ However, if the physician is employed by the same employer as the injured workman, the fellow-servant rules apply, and such a physician would not be open to common law liability. Utah is in accord with the majority view that physicians are liable in tort for negligent treatment of compensable injuries. In *Baker v. Wycoff*,⁴⁶ it was held that the subrogated state insurance fund could sue a malpractitioner. This result appears to be both logical and consistent with workmen's compensation policy. It merely recognizes that a physician in private practice should not be considered "in the same employment" as a worker in an unrelated industry and, therefore, should not have the benefit of statutory immunity.

If an employee whose compensable injury is aggravated by faulty medical treatment prefers to receive additional compensation, most courts, rather than proceed against the physician, hold that increased compensation is a proper remedy.⁴⁷ The apparent rationale for allowing additional compensation is that fault on the part of the physician, even if it amounts to an actionable, tortious act in itself, does not break the chain of causation of the original in-

⁴² 2 LARSON § 72.20; McCoid, *supra* note 8, at 404; *cf.* Callan v. Adams, 261 App. Div. 1004, 26 N.Y.S.2d 928 (1941).

⁴³ Stuginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10 (1939); Rehn v. Bingham, 151 Neb. 196, 36 N.W.2d 856, *appeal dismissed*, 338 U.S. 806 (1949); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634 (1947). *Contra*, Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934).

⁴⁴ UTAH CODE ANN. § 35-1-60 (1953).

⁴⁵ *E.g.*, Dodds v. Stellar, 30 Cal. 2d 496, 183 P.2d 658 (1947); Smith v. Coleman, 46 Cal. App. 2d 507, 116 P.2d 133 (Dist. Ct. App. 1941); Huntoon v. Pritchard, 371 Ill. 36, 20 N.E.2d 53 (1939); Schumacher v. Leslie, 360 Mo. 1238, 232 S.W.2d 913 (1950). *Contra*, McConnell v. Hames, 45 Ga. App. 307, 164 S.E. 476 (1932); Makarenko v. Scott, 132 W. Va. 430, 55 S.E.2d 88 (1949).

⁴⁶ 95 Utah 199, 79 P.2d 77 (1938).

⁴⁷ *E.g.*, Heaton v. Kerlan, 27 Cal. 2d 716, 166 P.2d 857 (1946); Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935); Ducasse v. Walworth Mfg. Co., 1 N.J. Super. 77, 62 A.2d 480 (Super. Ct. 1948).

jury.⁴⁸ The Utah court, in *Gunnison Sugar Co. v. Industrial Comm'n*,⁴⁹ held that additional compensation was a proper remedy and indicated that Utah law is in accord with the majority view.

III. NONCOMPENSABLE INJURY

If an employer causes injuries to his employees while they are not on the job (or in other circumstances in which the workmen's compensation statute is not applicable), the courts generally hold that the act does not interfere with the employees' common law action against the employer for damages.⁵⁰ An exception to this general rule is found when the injury occurs in the course of employment but is of the type not covered by the statute, such as disfigurement or impotency.⁵¹ It is usually held in such cases that the employer's statutory immunity remains intact and the injured employee has no claim against the employer for damages.⁵² The theory of these cases is that, inasmuch as compensation is intended to reimburse the employee for loss of earning power, if the injury caused no incapacity, it is not compensable, and, since workmen's compensation is the exclusive remedy, there can be no common law recovery. Therefore, all avenues of recovery are closed.

However, when the noncompensable injury does cause a working incapacity, the above theory is inapposite, and courts allow common law suits against the employer. Such suits frequently arise in cases of occupational disease when

⁴⁸ In *Kestenbaum v. Dunrite Painting Co.*, 12 App. Div. 2d 695, 207 N.Y.S.2d 917 (1960), deceased was found unconscious near some benzine. The doctors erroneously diagnosed the benzine poisoning as a brain tumor and performed a cranial operation. When the employee died from cerebral hemorrhaging, widow benefits were awarded his surviving spouse. In *McCorkle v. McCorkle*, 265 S.W.2d 779 (Ky. 1954), a surgeon's knife slipped during an operation for a herniated disc. When the employee bled to death, the court held the accident to be compensable. See *Spear v. Brockway Motor Co.*, 9 App. Div. 2d 799, 192 N.Y.S.2d 766 (1959).

⁴⁹ 73 Utah 535, 275 Pac. 777 (1929). Although not a workmen's compensation case, *Farnon v. Silver King Coalition Mines Co.*, 50 Utah 295, 167 Pac. 675 (1917), reached a similar result.

⁵⁰ *Tallon v. Interborough Rapid Transit Co.*, 232 N.Y. 410, 134 N.E. 327 (1922); *Hartz v. Schafer*, 303 Pa. 449, 154 Atl. 713 (1931). The rules of *respondeat superior* apply also, and an employee who is injured by another employee can sue the employer if the injury is not compensable. *White v. Checker Taxi Co.*, 284 Mass. 73, 187 N.E. 49 (1933). It has also been held that the employer can sue the employee for injuries in circumstances in which the act is not applicable. *Rosenfield v. Matthews*, 201 Minn. 113, 275 N.W. 698 (1937).

⁵¹ *Jolly v. J. M. Hampton & Sons Lumber Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962); *Hyett v. Northwestern Hosp.*, 147 Minn. 413, 180 N.W. 552 (1920); *Smith v. Baker*, 157 Okla. 155, 11 P.2d 132 (1932). Similarly, there can be no recovery for pain and suffering either through compensation or a tort suit. *Shaw v. Salt River Valley Water Users Ass'n*, 69 Ariz. 309, 213 P.2d 378 (1950); *Odum v. Arkansas Pipe Co.*, 208 Ark. 678, 187 S.W.2d 320 (1945). Many states, however, have special statutes providing for compensation for disfigurement. See 2 LARSON §§ 58.32, 65.30. Apparently, the reason for such statutes is the feeling that disfigurement may diminish the worker's ability to obtain employment. *Sweeting v. American Knife Co.*, 226 N.Y. 199, 123 N.E. 82, *aff'd*, 250 U.S. 596 (1919). Courts seem to be liberal in interpreting disfigurement statutes and give relief in rather tenuous circumstances. See *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941); *Grinnell Co. v. Smith*, 203 Okla. 158, 218 P.2d 1043 (1950); *Cagle v. Clinton Cotton Mills*, 216 S.C. 93, 56 S.E.2d 747 (1949).

⁵² *Jolly v. J. M. Hampton & Sons Lumber Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962); *Hyett v. Northwestern Hosp.*, 147 Minn. 413, 180 N.W. 552 (1920); *Smith v. Baker*, 157 Okla. 155, 11 P.2d 132 (1932).

the act gives no remedy for occupational disease⁵³ or the particular affliction is not included in the statute as a compensable disease.⁵⁴ Of course, in such suits the employee must overcome the obstacle — one that he would not have in workmen's compensation — of proving fault on the part of the employer.⁵⁵

The only Utah case in which damages for a noncompensable occupational disease were asked is in accord with the general rule that, if the injury causes an incapacity but is not compensable, the employer can be sued in tort. In *Young v. Salt Lake City*,⁵⁶ plaintiff's son, who was employed as a painter, contracted lead poisoning and died. The court held that, since the mother was not entitled to compensation under the occupational disease act, her common law action for damages was not barred. This is a desirable result and is entirely proper under the *quid pro quo* doctrine; if the injury is not compensable, there is no value given the employee in exchange for the employer's immunity from tort liability. It is logical that the compensation act should not be interpreted to take away employee's rights and give nothing in return.⁵⁷

IV. INTENTIONAL INJURIES

Courts uniformly require that for an injury to be compensable under the act it must arise out of the employment and must be accidentally caused.⁵⁸ If an employee is injured on the job, not accidentally, but through an intentional assault by the employer, it is generally held that the employee may recover under conventional tort law or elect to take compensation under the statutory scheme.⁵⁹ Tort suits against the employer are justified by courts, despite the compensation act, either on the ground that the employer is not permitted to assert that the injury was accidental or that a personal attack cannot be said to arise out of employment.⁶⁰ In determining what standard of fault to apply to the employer's conduct in such cases, courts have generally held that willful conduct with intent to injure is required and that lesser degrees of culpability, such as gross negligence, are not sufficient.⁶¹ However,

⁵³ *Dalton Foundries, Inc. v. Jeffries*, 114 Ind. App. 271, 51 N.E.2d 13 (1943); *Depre v. Pacific Coast Forge Co.*, 151 Wash. 430, 276 Pac. 89 (1929).

⁵⁴ *Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 201 N.W. 305 (1924); *Trout v. Wickwire Spencer Steel Corp.*, 195 N.Y. Supp. 528 (Sup. Ct. 1922).

⁵⁵ See *Donnelly v. Minneapolis Mfg. Co.*, *supra* note 54.

⁵⁶ 97 Utah 123, 90 P.2d 174 (1939). The *Young* case is discussed by Justice Wade in his dissenting opinion in *Masich v. United States Smelting, Ref. & Mining Co.*, 113 Utah 101, 129, 191 P.2d 612, 634, *appeal dismissed*, 355 U.S. 866 (1948).

⁵⁷ See *Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 201 N.W. 305, 307 (1924), in which the court states that to refuse an action for damages when compensation is not available "would take away a common-law remedy without substituting anything for it."

⁵⁸ See *MALONE & PLANT, WORKMEN'S COMPENSATION* 140-41 (1963). See generally 1 *LARSON* §§ 29.00-22, 38.80-83.

⁵⁹ If the employee chooses either compensation or a tort action, he bars a subsequent attempt to pursue the other remedy. *Legault v. Brown*, 283 App. Div. 303, 127 N.Y.S.2d 601 (1954); *Burgess v. Tryde Mfg. Co.*, 20 Misc. 2d 875, 195 N.Y.S.2d 519 (Sup. Ct. 1960); *cf. Davis v. United States Fid. & Guar. Co.*, 206 Tenn. 683, 337 S.W.2d 240 (1960).

⁶⁰ *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950); *Conway v. Globin*, 105 Cal. App. 2d 495, 233 P.2d 612 (Dist. Ct. App. 1951).

⁶¹ See *Moise v. Owens*, 96 Cal. 2d 617, 216 P.2d 22 (1950); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946); *Castleberry v. Frost-Johnson Lumber Co.*, 283

the statutes in some states, including Utah, do increase the amount of compensation allowable in the event of gross negligence.⁶²

When an injury is caused through an intentional assault by a fellow servant or a third person, the opportunity to obtain compensation for such injuries depends upon the circumstances surrounding the incident. Thus, if an off-the-job grievance causes an on-the-job attack, the injury is properly classified as not arising out of employment, and the employer is not liable for compensation, nor is the offending employee given immunity from tort liability. However, if there is something about the employment that has contributed to the injury, courts generally allow the claimant to collect compensation.⁶³ Therefore, in cases in which the fact that the injured person is on the job makes him more vulnerable to attack, such as being a night watchman⁶⁴ or a policeman⁶⁵ or when the industry is partially responsible for provoking the attack by the presence of such factors as overfatigue and increased tensions brought on by job conditions,⁶⁶ the employment has contributed to the injury and the claimant should have the option of taking compensation or a third-party suit. Perhaps the reason courts have been willing to find a connection with the employment is that the financial condition of the culpable co-worker may be such that a right to a tort action against him would be valueless. Thus, if compensation were not available, an employee who was injured on the job would be left without an effective remedy, thus, of course, thwarting the social goal of workmen's compensation that job-connected injuries should be readily compensated.

If a claimant is assaulted by a co-employee who is insane at the time of the attack, the majority of decisions holds that the injury arises out of employment and that the injured employee is entitled to compensation.⁶⁷ The reason for this result seems to be that the employer has subjected the employee to the risk of a fellow servant's becoming violent because of insanity.⁶⁸ Under this theory

S.W. 141 (Tex. Civ. App. 1926); *Brewer v. Appalachian Constructors, Inc.*, 135 W. Va. 739, 65 S.E.2d 87, 94 (1951), *rev'd*, 76 S.E.2d 916 (1953).

⁶² CAL. LABOR CODE § 4553. UTAH CODE ANN. § 35-1-12 (1953) provides that, in case of willful violation of safety rules, compensation is increased 15%.

⁶³ See *Coombs v. Industrial Comm'n*, 352 Ill. 399, 186 N.E. 190 (1933); *Gargano v. Essex County News Co.*, 129 N.J.L. 369, 29 A.2d 879, *aff'd*, 130 N.J. 559, 33 A.2d 905 (1943); *Toro v. 1700 First Ave. Corp.*, 16 App. Div. 2d 852, 227 N.Y.S.2d 605 (1962), *aff'd*, 12 N.Y.2d 1001, 189 N.E.2d 625, 239 N.Y.S.2d 130 (1963). For an exhaustive comparison of the treatment given assault cases in workmen's compensation and tort, see Small, *The Effect of Workmen's Compensation Trends on Agency-Tort Concepts of Scope of Employment* (pts. 1-2), 11 NACCA L.J. 19, 12 NACCA L.J. 21 (1953).

⁶⁴ *Smith v. Kaw Boiler Works Co.*, 104 Kan. 591, 180 Pac. 259 (1919).

⁶⁵ See *Kennedy v. Williamsburg County*, 242 S.C. 477, 131 S.E.2d 512 (1963); *City of Richmond v. Johnson*, 202 Va. 33, 115 S.E.2d 910 (1960).

⁶⁶ *Hartford Acc. & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940); *Mutual Implement & Hardware Ins. Co. v. Pittman*, 214 Miss. 823, 59 So. 2d 547 (1952); *Bennett v. Dreier Structural Steel Co.*, 8 App. Div. 2d 178, 186 N.Y.S.2d 776 (1959).

⁶⁷ *E.g.*, *Anderson v. Security Bldg. Co.*, 100 Conn. 373, 123 Atl. 843 (1924); *Chadwick v. White Provision Co.*, 82 Ga. App. 249, 60 S.E.2d 551 (1950); *Whaley v. Patent Button Co.*, 184 Tenn. 700, 202 S.W.2d 649 (1947); *John H. Kaiser Lumber Co. v. Industrial Comm'n*, 181 Wis. 513, 195 N.W. 329 (1923).

⁶⁸ See *Anderson v. Security Bldg. Co.*, *supra* note 67; *Howard v. Harwood's Restaurant Co.*, 40 N.J. Super. 564, 123 A.2d 815 (Essex County Ct. 1956), *aff'd*, 43 N.J. Super. 301, 128 A.2d 727 (Super. Ct.), *aff'd*, 25 N.J. 72, 135 A.2d 161 (1957).

it is immaterial whether the employer actually knows of a dangerous mental deficiency, just as it is immaterial for workmen's compensation purposes that he be aware of a latent defect in a machine which causes injury.⁶⁹ Similar theories of recovery have been successful when applied to co-employees who have become excessively drunk and caused consequent employment risk and injury.⁷⁰

Unfortunately, the only Utah case involving an assault by an insane co-worker did not follow these theories. In *Spring Canyon Coal Co. v. Industrial Comm'n*,⁷¹ a workman received fatal injuries from a violent beating by a fellow employee. Notwithstanding the fact that the assailant was insane at the time, the court held that the injury did not arise out of employment, and a compensation claim by the widow was denied. Apparently the court's reasoning was based on the feeling that an intentional felonious act could not arise out of employment.

Although an assault may be held to arise out of employment, there remains the technical obstacle that an intentional injury cannot be considered to be accidental. To disallow compensation on this ground for job-connected injuries would do violence to the salutary purpose of workmen's compensation legislation that all job-connected injuries should be compensated. In addition, by considering the problem from the standpoint of the injured workman, who has been the innocent victim of an unprovoked assault, it would be so unexpected that it could be considered accidental.⁷²

V. CONTRACTORS

If contractors with no relationship to each other are engaged in separate projects, and an employee of one contractor injures the employee of another, the offending employee is clearly a third person subject to tort liability, and his employer is subject to *respondeat superior*.⁷³ Under an arrangement where

⁶⁹ *Ibid.*

⁷⁰ *In re Employers' Liab. Assur. Corp.*, 215 Mass. 497, 102 N.E. 697 (1913); *Perez v. Fred Harvey, Inc.*, 54 N.M. 339, 224 P.2d 524 (1950); *Wilson v. Boyd & Goforth*, 207 N.C. 344, 177 S.E. 178 (1934).

⁷¹ 58 Utah 608, 201 Pac. 173 (1921).

⁷² See 2 LARSON § 68.12.

⁷³ Under statutes giving immunity either to "employers" only, or to all persons "in the same employment," there is no reason to extend immunity to persons who are outside the intent and wording of the act. Generally, there is no cause to isolate contractors in unrelated employment as a class for special immunity treatment. An exception to this rule is that certain jurisdictions have had statutes giving immunity to all persons who have qualified under the compensation statutes as "employers." These statutes were unfavorably regarded and all of them have been repealed. The most notable were in Illinois and Washington. The Illinois statute was held unconstitutional in *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952), on the ground that the distinction drawn between third persons subject to the act and those not subject was arbitrary. As a result, the Illinois Legislature passed a statute permitting a common law action whenever the injury is caused by someone other than the employer or his employees. ILL. ANN. STAT. ch. 48, § 138.5(b) (Smith-Hurd Supp. 1963). In *Hand v. Greyhound Corp.*, 49 Wash. 2d 171, 299 P.2d 554 (1956), the Washington court was faced with an argument that the act was unconstitutional. The court rejected the reasoning of the Illinois court in *Grasse* in favor of the argument that the Illinois act was an "employer's liability act" and Washington's act was a state-operated insurance program and the employers were entitled to immunity. Nevertheless, the following year the legislature repealed the broad immunity

two or more contractors are engaged in a single project, however, the question whether they are so closely related as to be immune to tort liability raises issues that are not easily reconciled. For instance, it may be asserted that, since these contractors and their employees are cooperating on a single project, they are "in the same employment" or are working for the same "employer" and should be given mutual immunity.⁷⁴ Conversely, it can be argued that, if there is no participation in the payment of workmen's compensation coverage for the employees of another contractor, there is no *quid pro quo* on which immunity can be based.⁷⁵

It is not always possible to discern from the wording of a particular act whether or not a designated contractor will be classified as a third person. In some jurisdictions, where the statute is couched in terms giving broad immunity to contractors, courts tend to interpret the act narrowly;⁷⁶ whereas, if restrictive language is employed, some courts construe the act liberally,⁷⁷ so long as it does not require an interpretation which is plainly prohibited. As a general rule, however, courts do not give broad immunity to all contractors on the same or on a related project.⁷⁸

The majority of jurisdictions has statutes, generically called "contractor-under" statutes,⁷⁹ providing that a principal contractor shall be liable for compensation to the employees of uninsured subcontractors under him, who are doing business which is part of the "business, trade or occupation" of the principal contractor.⁸⁰ The phrase "principal contractor" usually refers to an owner of the project or to the general contractor upon whom the act imposes the ultimate burden of having everyone working on the project insured;⁸¹ and the term "subcontractor" means any contractor under the supervision of the principal contractor.⁸² Subcontractors are usually given the primary responsibility

provisions and restricted coverage to persons "in the same employ." WASH. REV. CODE § 51.24.010 (1957); see 2 LARSON § 72.40 & Supp.

⁷⁴ This is the result reached in Massachusetts and Florida. See *Miami Roofing & Sheet Metal Co. v. Kindt*, 48 So. 2d 840 (Fla. 1950); *Younger v. Giller Contracting Co.*, 143 Fla. 335, 196 So. 690 (1940); *Catalano v. George F. Watts Corp.*, 255 Mass. 605, 152 N.E. 46 (1926).

⁷⁵ This is the result reached in the majority of jurisdictions. See, e.g., *Bagnel v. Springfield Sand & Tile Co.*, 144 F.2d 65 (1st Cir. 1944); *Farrell v. L. C. De Felice & Son*, 132 Conn. 81, 42 A.2d 697 (1945); *Davidson v. Martin K. Elby Constr. Co.*, 169 Kan. 256, 218 P.2d 219 (1950); *Rota-Cone Oil Field Operating Co. v. Chamness*, 197 Okla. 103, 168 P.2d 1007 (1946).

⁷⁶ See 2 LARSON § 72.40 for an interesting synthesis of cases reaching a result that is unexpected under the particular statute. See also 2 LARSON §§ 72.32-33.

⁷⁷ See 2 LARSON § 72.40.

⁷⁸ See cases cited note 75 *supra*.

⁷⁹ Apparently Professor Larson is the author of the phrase "contractor-under." See 1 LARSON § 49.11. See also 2 LARSON § 72.31 & Supp.

⁸⁰ The requirement that the work be part of the employer's business seems to be used in contradistinction to duties which are merely ancillary. The "ancillary" activities are apparently those involved in such pursuits as maintenance and repair, construction of new facilities, and delivery of materials or supplying services. See *Wallace v. Pacific Elec. Ry.*, 105 Cal. App. 664, 288 Pac. 834 (Dist. Ct. App. 1930) (railway express services); *Sullivan v. City of Butte*, 117 Mont. 215, 157 P.2d 479 (1945) (delivery of asphalt to paving project); *Taylor v. New York Cent. R.R.*, 294 N.Y. 397, 62 N.E.2d 777 (1945) (supplying pullman cars for railroad). See generally 1 LARSON § 49.12.

⁸¹ See 1 LARSON § 49.12.

⁸² *Ibid.*

of insuring their own employees, but the duty of providing such insurance falls upon the principal contractor in the event that the subcontractor fails to do so.⁸³ Generally, under these statutes, if the facts are such that the principal is, in fact, liable for the compensation coverage, he is held to be immune from tort suit;⁸⁴ however, if the facts necessary to make complete his obligation of providing compensation are not present — as when the subcontractor is insured — the result in most cases has been that the principal contractor remains a third party who is subject to tort liability.⁸⁵ This outcome has been criticized on the ground that the object of most “contractor-under” statutes is to encourage principal contractors to require the contractors under them to carry compensation insurance; but, if the general contractor does, in fact, accomplish this goal, his reward, ironically, is loss of immunity from third-party suit.⁸⁶ In order to protect the principal in these circumstances, it has been recommended that he be given complete immunity from suit by employees of contractors under him on the reasoning that his overall responsibility for requiring the subcontractor to be insured and his latent liability if the subcontractor fails to obtain coverage should be sufficient to remove the principal from the category of a third person.⁸⁷

Utah’s “contractor-under” statute, however, is of a different nature from those just discussed, since it is not based upon the object of having the principal encourage subcontractors to obtain workmen’s compensation insurance.⁸⁸ Furthermore, it does not provide for latent liability for compensation if the subcontractor is not insured. Instead, Utah’s statute distinguishes between subcontractors and independent contractors and makes the principal contractor absolutely liable for compensation for a *subcontractor’s* employees, but imposes no obligation whatsoever on the principal to insure or require the contractor to insure the employees of an *independent contractor*:

Where any employer procures any work to be done . . . by a contractor over whose work he retains supervision or control . . . such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed . . . employees of such original employer.⁸⁹

⁸³ See ARK. STAT. ANN. § 81-1306 (1947); FLA. STAT. § 440.10 (1959); GA. CODE ANN. § 114-112 (1956); ILL. REV. STAT. ch. 48, § 138.1(3) (1959); MICH. COMP. LAWS § 411.10 (1948); MISS. CODE ANN. § 6998-04 (Supp. 1962); MO. REV. STAT. § 287.040 (1949); N.C. GEN. STAT. § 97-19 (1958).

⁸⁴ Davis v. Starrett Bros., 39 Ga. App. 422, 147 S.E. 530 (1929); Fox v. Dunning, 124 Okla. 228, 255 Pac. 582 (1927); see 2 LARSON § 72.31.

⁸⁵ Buffa v. General Motors Corp., 141 F. Supp. 803 (E.D. Mich. 1956); Baker & Conrad, Inc. v. Chicago Heights Constr. Co., 364 Ill. 386, 4 N.E.2d 953 (1936); Cathey v. Southeastern Constr. Co., 218 N.C. 525, 11 S.E.2d 571 (1949); see 2 LARSON § 72.31.

⁸⁶ 2 LARSON § 72.31.

⁸⁷ *Ibid.*

⁸⁸ The Utah statute imposes an absolute obligation on the principal employer to provide compensation for employees of “subcontractors.” Subcontractors are apparently defined as those contractors over whose work the principal retains sufficient control that the contractor is not an “independent contractor.” The principal has no statutory obligation to provide compensation for employees of “independent contractors.” UTAH CODE ANN. § 35-1-42 (1953).

⁸⁹ *Ibid.*

Under this statute there can be little doubt that, if a general contractor retains control over the subcontractor under him, the statute imposes an absolute obligation of providing coverage for the employees of such subcontractor, and the general contractor would be entitled to immunity under the act. There is doubt, however, whether there is immunity in cases involving contractors who do not fall into this category. According to the statute, when the principal does not retain control and the contractor under him is an independent contractor, "any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer . . ." ⁹⁰ Being thus "deemed an employer," an independent contractor is responsible for compensation to his employees and the principal contractor is relieved of this obligation.⁹¹ However, that an independent contractor is "deemed an employer" does not necessarily preclude him from being "in the same employment" with other contractors. Hence, the act is ambiguous with respect to whether there can be mutual immunity between an independent contractor and a principal employer or another independent contractor.

A. *Alternative Solutions*

In Oklahoma, where a number of definitive cases have arisen under a statute similar to Utah's, the court has indicated that the rules for determining whether or not two contractors are "in the same employment" should be the same as the rules for determining whether or not the contractor is an independent contractor.⁹² Thus Oklahoma cases, although reaching opposite results on similar facts,⁹³ evidence a judicial attitude that, if one is an independent contractor, he is not "in the same employment" with other contractors on the same job and is, consequently, amenable to common law liability.⁹⁴ Undoubtedly, this may be a proper result in certain cases, but it is difficult to agree with some of the reasons given by the Oklahoma court for holding that independent contractors are not "in the same employment" with other contractors. For example, in the case in which an employee of contractor *A*, a material man, injured an employee of *B*, a plastering contractor, the court emphasized that, if *A* was not liable to the injured workman for compensation and was likewise immune to a suit for damages, he would escape liability altogether for the

⁹⁰ *Ibid.*

⁹¹ See, e.g., *Sutton v. Industrial Comm'n*, 9 Utah 2d 339, 344 P.2d 538 (1959); *Gogoff v. Industrial Comm'n*, 77 Utah 355, 296 Pac. 229 (1931); *Stricker v. Industrial Comm'n*, 55 Utah 603, 188 Pac. 849 (1920).

⁹² In *Thompson v. Kiester*, 141 Okla. 69, 73, 283 Pac. 1018, 1022 (1930), the Oklahoma court stated:

We do not think that the term "in the same employ," as used in the Compensation Act, was so limited that both parties must be hired and working directly under the same person. If they are engaged in the same general business . . . and for the same general employers, they are in the same employ as intended by the act. . . . However, we do believe that the same rule as applied in determining who is an independent contractor is applicable in determining whether two parties are in the same employ.

⁹³ Compare *Rota-Cone Oil Field Operating Co. v. Chamness*, 197 Okla. 103, 168 P.2d 1007 (1946), with *Thompson v. Kiester*, 141 Okla. 69, 283 Pac. 1018 (1930). It has been suggested that, since the facts in these two cases are so similar, the cases contradict each other by reaching opposite conclusions. Note, 11 OKLA. L. REV. 108, 110 (1958).

⁹⁴ See cases cited note 93 *supra*.

negligent acts of his servant.⁹⁵ Although at first this may seem to be an adequate reason for denying immunity, it must be remembered that if *A* is to be liable for the tort of his servant, it will be on the theory of *respondeat superior* which, like workmen's compensation, is a concept in which the party who is held liable can be without fault. Thus, the problem really involves two no-fault principles of liability in conflict rather than a culpable tortfeasor escaping liability. That being the case, it would not seem unjust in certain cases to limit the injured employee to a single remedy under the act rather than to allow him a double remedy⁹⁶ by way of both compensation and third-party suit. The possible inequity that would result from permitting such a multiple remedy is demonstrated in a case in which the employer of the injured workman was personally guilty of negligence which contributed to the injury. For us to appreciate fully the suggested inequity, it is necessary to consider that most courts hold that the concurring negligence of an employer is not a bar to an employee's suit against a third person,⁹⁷ nor does it even mitigate the damages, and that most courts deny third persons indemnity or contribution against the employer.⁹⁸ Thus, an innocent third person would be held liable in a suit for damages under rules of *respondeat superior*, while a culpable employer would be given absolute protection and his negligence would not even be allowed to mitigate the damages. Although contribution or indemnity is allowed against the employer in some jurisdictions, it is not a satisfactory solution under workmen's compensation principles, because, as discussed previously,⁹⁹ the net effect is that the employee is allowed to do indirectly what he is not allowed to do directly — to recover an unlimited amount of damages against his employer in a tort action, which is arguably in violation of the "exclusive-remedy" provisions of the workmen's compensation act.

The Oklahoma rule has at least the advantage of predictability and ease of application, and, except for the conceptual problem involving reconciliation of competing no-fault principles, it is probably justified when applied horizontally, as between various independent contractors under one general contractor. This is so because there is ordinarily no participation by one independent contractor in paying the workmen's compensation premiums on the employees of another independent contractor. However, if it is applied vertically — as between an independent contractor and the principal employer over him — the Oklahoma ruling is in conflict with the *quid pro quo* theory. Since it is probable that independent contractors include the cost of workmen's compensation insurance in the price of their bids, it is the principal rather than the independent contractor who ultimately assumes the financial burden of workmen's compensa-

⁹⁵ *Dolese Bros. v. Tollett*, 162 Okla. 158, 19 P.2d 570 (1933).

⁹⁶ That an employee is given a double remedy does not mean that he is obtaining a double recovery because, in case of a third-party suit, after claiming compensation, the employer is entitled to indemnity to the extent of the compensation paid. See note 14 *supra*.

⁹⁷ For examples of cases with this result, see *Baird v. John McShain, Inc.*, 108 F. Supp. 553 (D.D.C. 1952); *Baltimore Transit Co. v. State*, 183 Md. 674, 39 A.2d 858 (1944); *Annot.*, 156 A.L.R. 467 (1945).

⁹⁸ *Ibid.*

⁹⁹ See note 32 *supra* and accompanying text.

tion coverage for the subordinate contractors' employees. It would, therefore, not violate the spirit of the workmen's compensation legislation to consider the principal and independent contractor to be "in the same employment" and, thus, to allow the principal to be relieved of tort liability to the contractor's employees.

A special note in tentative draft, number seven of the *Restatement of Torts (Second)*, is in general agreement with the idea of granting immunity to a principal who retains an independent contractor,¹⁰⁰ on the basis that the cost of workmen's compensation insurance is expected to be included by the lesser contractor in his bid price for the work, and will ultimately be borne by the principal employer.¹⁰¹ The *Restatement* drafters' position receives indirect support in Utah from the case of *Burke v. Industrial Comm'n.*¹⁰² In *Burke*, an independent contractor with only a few employees made an arrangement with his principal, who had many employees, whereby the principal would carry insurance on all employees, thus allowing them to qualify for a more advantageous compensation insurance rate. The court held that this arrangement was sufficient to make the employees of the independent contractor the statutory "employees" of the principal. If, under the holding of *Burke*, the principal contractor receives immunity by paying the premiums directly, he should be entitled to immunity as recommended by the *Restatement* note by paying the same premiums indirectly.

The Colorado Legislature has dealt with the problem of related contractors by providing that any "lessee, sublessee, contractor or subcontractor," as well as their employees, are employees of anyone who conducts his business by leasing or contracting out part or all of his work to them¹⁰³ — a desirable solution to the problem, for it comports with the reasoning of the *Restatement* drafters and meets with the approval of authoritative writers in the workmen's compensation field.¹⁰⁴ Furthermore, since the statute makes each employee on the project the statutory employee of the principal, it would be easily justifiable under the *quid pro quo* theory.

B. Utah Cases

The vast majority of suits under the section of Utah's acts which permits third-party actions has been brought by plaintiffs who were attempting to prove that they were "employees" entitled to compensation under the act,¹⁰⁵ and not attempting to establish third-party liability. No Utah case has been found which has directly presented the question of whether an independent contractor and his principal are "in the same employment" and, hence, immune

¹⁰⁰ RESTATEMENT (SECOND), TORTS, Special Note ch. 15, at 17-18 (Tent. Draft No. 7, 1962).

¹⁰¹ *Ibid.*

¹⁰² 75 Utah 441, 286 Pac. 623 (1930).

¹⁰³ COLO. REV. STAT. ANN. § 81-9-1 (1953).

¹⁰⁴ See 2 LARSON § 72.31.

¹⁰⁵ *Parkinson v. Industrial Comm'n.*, 110 Utah 309, 172 P.2d 136 (1946); *Murch Bros. Constr. Co. v. Industrial Comm'n.*, 84 Utah 494, 36 P.2d 1053 (1934); *Gogoff v. Industrial Comm'n.*, 77 Utah 355, 296 Pac. 229 (1931); *Ludlow v. Industrial Comm'n.*, 65 Utah 168, 235 Pac. 884 (1925).

from tort liability arising from injuries to employees of either of them; but there are cases which approach the problem. Of the few cases in which an attempt has been made to hold a third person liable, in only two did the defendant plead the act as a defense. In *Murray v. Wasatch Grading Co.*,¹⁰⁶ construction company *A* was building a road parallel to a railroad track. The contract between *A* and the state road commission stated that *A* was to "provide at his own expense" persons to keep the tracks free from debris. Plaintiff, an employee of railroad company *B*, was taken by *B* to *A*'s construction site with instructions to warn *A* of approaching trains and to warn trainmen of possible obstructions on the tracks. Plaintiff was paid his salary by *B*, but *B* was reimbursed by *A* for plaintiff's services. When plaintiff was injured by the alleged negligence of *A*'s employees, the court held that plaintiff was an employee of *A* and workmen's compensation was his exclusive remedy, although *A* did not list plaintiff as an employee with the state industrial commission. In *Cook v. Peter Kiewit Sons Co.*,¹⁰⁷ two contractors entered into a contract to construct a tunnel. They were to share the profits and the losses, and each was to carry workmen's compensation insurance on his own employees. When plaintiff, an employee of *A*, was injured by the alleged negligence of *B* the court held they were "in the same employment," and an action for damages was precluded. The court stated that in a joint venture arrangement "the partnership entity should be regarded as the employing unit; and the employees of both companies as engaged in the same employment."¹⁰⁸ This suggests that an employer could obtain immunity against suit by the employees of another independent contractor on the same job by making the project a joint venture. There are instances in Utah in which employees of independent contractors have succeeded in tort actions against the principal employer. For example, the court in *Robinson v. Union Pac. R.R.*¹⁰⁹ held that an employee of a contractor, who was retained by the railroad company to construct new lines or relay old ones, could maintain a tort action against the railroad company. However, the defense of being "in the same employment" was not raised; therefore, the question of whether an independent contractor can be "in the same employment" with his principal was not presented. Thus, a synthesis of cases under Utah's act reveals that in at least some circumstances independent contractors and their employees are considered "in the same employment" with other contractors and mutual immunity is afforded; however, in no case has the Utah court ventured so far as to make a definitive statement as to when this can be expected.

Although there are only a few cases attempting to establish third-party liability under the Utah act, there are cases holding that, if a contractor is found to be "independent," the principal is not liable for compensation.¹¹⁰

¹⁰⁶ 73 Utah 430, 274 Pac. 940 (1929).

¹⁰⁷ 15 Utah 2d 20, 386 P.2d 616 (1963).

¹⁰⁸ *Id.* at 23, 386 P.2d at 618.

¹⁰⁹ 70 Utah 441, 261 Pac. 9 (1927).

¹¹⁰ *E.g.*, *Parkinson v. Industrial Comm'n*, 110 Utah 309, 172 P.2d 136 (1946); *Gogoff v. Industrial Comm'n*, 77 Utah 355, 296 Pac. 229 (1931); *Angel v. Industrial Comm'n*,

However, these cases do not answer the question of whether the fact that the principal is not liable for compensation also means that he is a third party subject to possible tort liability. If having some liability for workmen's compensation coverage was the sole basis for immunity under the act, the fact that a principal was not liable for compensation to the employees of an independent contractor would indicate that a principal should not be given immunity with respect to the contractor's employees. Having responsibility for compensation insurance premiums, however, does not seem to be an indispensable factor under Utah cases in determining whether a contractor has tort immunity. In *Cook*,¹¹¹ the defendant-employer who received immunity was not responsible for workmen's compensation insurance on the injured employee. In *Murray*,¹¹² an employer was given exemption from tort liability on the bases that an employee could have two employers, and that the defendant had paid no compensation premiums on the injured workman or even listed him as an employee was inconsequential. In *Burke*,¹¹³ immunity was purchased by the principal's paying the premiums directly under an agreement with the contractor when he had no statutory obligation to do so. These cases contradict the theory advanced by the Oklahoma court that independent contractors and principals are automatically not "in the same employment." The Utah decisions suggest that the court looks to the facts of each case and then makes a determination on an *ad hoc* basis of whether two contractors are "in the same employment."¹¹⁴ Furthermore, the Utah Supreme Court recognizes the compromise character of the act as it has been designed by the legislature and attempts to guard the rights of employers as zealously as it guards the rights of employees.¹¹⁵ In point of fact, the doctrine of the *Burke* case, that a principal can obtain immunity by directly paying the compensation premiums on the employees of an independent contractor under him and the strong position favoring the *quid pro quo* doctrine in Utah suggest that a principal employer and an independent contractor under him should be considered "in the same employment." Therefore, the position suggested by the *Restatement*, that a principal who retains an independent contractor should be given immunity from tort liability to the contractor's employees because he indirectly pays the workmen's compensa-

64 Utah 105, 228 Pac. 509 (1924); see *Sutton v. Industrial Comm'n*, 9 Utah 2d 339, 344 P.2d 538 (1959).

¹¹¹ *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963).

¹¹² *Murray v. Wasatch Grading Co.*, 73 Utah 430, 274 Pac. 940 (1929).

¹¹³ *Burke v. Industrial Comm'n*, 75 Utah 441, 286 Pac. 623 (1930).

¹¹⁴ This does not mean, of course, that the Utah court will not reach the same result as the Oklahoma court in certain cases. Indeed such a result was present in *Robinson v. Union Pac. R.R.*, 70 Utah 441, 261 Pac. 9 (1927). However, it does appear that the Utah court has not bound itself to any arbitrary rule which may be productive of injustice because of its inflexibility.

¹¹⁵ In *Maryland Cas. Co. v. Industrial Comm'n*, 12 Utah 2d 223, 225, 364 P.2d 1020, 1022 (1961), the court stated, "To accomplish its salutary purpose, the Act should be liberally construed in favor of coverage of the claimant." See *Spencer v. Industrial Comm'n*, 4 Utah 2d 185, 290 P.2d 692 (1955); *Jones v. California Packing Co.*, 121 Utah 612, 244 P.2d 640 (1952); *M. & K. Corp. v. Industrial Comm'n*, 112 Utah 488, 189 P.2d 132 (1948). Compare *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963), where the court indicated that the same rules of liberal construction of the act were applicable in favor of employers as well as employees.

tion premiums, would be in harmony with existing cases in Utah and would be a desirable approach to the problem.

C. Intrinsically Dangerous Work — Analogy to Contractor Problems

Although there is a paucity of case law under Utah's workmen's compensation law dealing with the status of independent contractors, there is some useful authority from an analogous area, namely that involving the liability of principal employers for the activities of independent contractors performing work which is intrinsically dangerous. The body of law concerned with intrinsically dangerous work may be considered analogous to workmen's compensation because each is founded upon no-fault principles. The principal reason for comparing workmen's compensation with the law of intrinsically dangerous work is that many injuries are caused on the job from this type of work. Where such injuries occur, the law of intrinsically dangerous work must be in harmony with workmen's compensation law in order to prevent inconsistent results in such cases merely because one suit is brought as a third-party action under the workmen's compensation act and another is brought without reference to the act. Thus, when an employee of an independent contractor is injured in an inherently dangerous assignment, such as blasting, it would be illogical to allow him a suit against the principal as a third party under the act if that same suit would be disallowed by the law concerned with intrinsically dangerous work.

Generally, an owner of property is liable to third persons for injuries resulting from inherently dangerous work done by an independent contractor.¹¹⁶ The question has arisen whether the employees of an independent contractor doing inherently dangerous work are third persons within the meaning of this rule. In such a case, the Texas court stated unequivocally that such employees were not third persons.¹¹⁷ The Utah court, in *Dayton v. Free*,¹¹⁸ has indicated that it will reach the same result. In that case, an employee of an independent contractor who was injured in a mine explosion attempted to sue the owner of the mine. The court intimating that the employee had no grounds for relief stated: "but it is said developing a tunnel by underground blasting is dangerous. Dangerous to whom? Here only to those engaged in and about the work. . . . Here the stipulated work itself . . . did not involve injurious or mischievous consequences to others."¹¹⁹ Other cases have held that blasting, which is generally considered inherently dangerous, is not inherently dangerous

¹¹⁶ See *Southwestern Bell Tel. Co. v. Smith*, 220 Ark. 223, 247 S.W.2d 16 (1952); *Whalen v. Shivik*, 326 Mass. 142, 93 N.E.2d 393 (1950); *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953); *Evans v. Elliott*, 220 N.C. 253, 17 S.E.2d 125 (1941).

¹¹⁷ *Humble Oil & Ref. Co. v. Bell*, 180 S.W.2d 970 (Tex. Ct. App. 1943); accord, *Sword v. Gulf Oil Corp.*, 251 F.2d 829 (5th Cir. 1958); *Hurst v. Gulf Oil Corp.*, 251 F.2d 836 (5th Cir. 1958); *Cagle v. McQueen*, 200 F.2d 186 (5th Cir. 1952); *Terry v. A. P. Green Fire Brick Co.*, 164 F. Supp. 184 (E.D. Ark. 1958); *Trecartin v. Mahony-Troast Constr. Co.*, 18 N.J. Super. 380, 87 A.2d 349 (Super. Ct. 1952); *Wellman v. East Ohio Gas Co.*, 160 Ohio 103, 113 N.E.2d 629 (1953). *Contra*, *Woolen v. Aerojet Gen. Corp.*, 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962).

¹¹⁸ 46 Utah 277, 148 Pac. 408 (1914).

¹¹⁹ *Id.* at 287, 148 Pac. at 412.

if done in a remote area.¹²⁰ Since blasting is as dangerous to those who engage in it, whether the area is remote or populated, these cases can only mean that those who do the blasting are not third persons with the right to sue the principal employer. Thus, under *Dayton v. Free*, it may be concluded that when the work being done is intrinsically dangerous the employees of an independent contractor are not third persons as to the principal employer, and, consequently, the principal would not be amenable to a tort action under rules of inherently dangerous work. This doctrine was reinforced and given a closer relationship to workmen's compensation in *Gleason v. Salt Lake City*,¹²¹ in which the court quoted, "in any of these situations [which are intrinsically dangerous], the servants of the independent contractor are in effect the servants of the principal employer."¹²² Thus, in light of the Utah court's avowed policy of employing the same rules of liberal construction of the act whether the litigation involves a compensation claim or a third-party tort action,¹²³ employees of an independent contractor engaged in inherently dangerous work should be considered "employees" of the principal employer.

The question of what effect cases on collateral points of law — such as intrinsically dangerous work — would have in workmen's compensation litigation has not yet been presented to the Utah court, but the results in the two fields should not be in conflict. The Tenth Circuit, in construing Utah's statute, has indicated that common law principles should have a considerable effect on the determination of who should be a third person for workmen's compensation purposes:

It is to be borne in mind that it was not the legislative purpose in the enactment of [this statute] . . . to create a shield for a third party tort-feasor. It was not intended to limit or proscribe the liability of such a wrongdoer. It was designed solely to permit an employer or insurance carrier who pays compensation in accordance with the Act to participate in the recovery had from the third party tort-feasor . . .¹²⁴

Thus, the court states that the statute is not intended to diminish the tort liability of third persons. It seems logical, therefore, since there is no indication in the act that the liability of third persons is to be increased, that the statute is not intended to alter the common law liability of third persons whatsoever. The statute does not create liability of third persons or define who they shall be, thus, indicating that the issue should be decided on common law rules. The application of common law rules, at least where work is intrinsically dangerous, would place a principal employer and the employees of an independent contractor under him, "in the same employment" — obviously an indication that the principal should not be liable in tort to the independent contractor's employees.

¹²⁰ See, e.g., *Hope v. Texas-New Mexico Pipeline Co.*, 145 F.2d 862 (5th Cir. 1944); *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 Pac. 82 (1907).

¹²¹ 94 Utah 1, 74 P.2d 1225 (1937).

¹²² *Id.* at 16, 74 P.2d at 1232.

¹²³ See *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963).

¹²⁴ *Jay v. Chicago Bridge & Iron Co.*, 150 F.2d 247, 249 (10th Cir. 1945).

VI. CONCLUSION

Part of the purpose of workmen's compensation legislation is to eliminate the necessity of court action in order to determine the rights and liabilities of the parties;¹²⁵ however, ambiguous language in the act, such as that which extends immunity to all persons "in the same employment," is more likely to create litigation than to prevent it. Since workmen's compensation was conceived and born of legislative effort, the legislature should revise the statute in a manner similar to that done in Colorado,¹²⁶ thus removing the ambiguity from the "in the same employment" provision.

Until such amendments are forthcoming, if the work which causes injuries is intrinsically dangerous, the court should provide immunity to principal employers by holding that the employees of an independent contractor are "in the same employment" as the principal. This result should also be extended to other cases under the appealing reasoning of the *Restatement* Committee and the *quid pro quo* doctrine, that the principal employer should be considered to be "in the same employment" with the employees of an independent contractor because he, in effect, pays the compensation premiums. Some jurisdictions, however, by a restrictive interpretation of the statute, have held that all independent contractors are not "in the same employment" with other contractors or persons. Therefore, until the issue is settled in Utah, the safest course to follow for one who contemplates employing an independent contractor and wants to insulate himself from possible tort liability would be to retain sufficient control so that the contractor is not "independent," or use the approach of the *Burke* case and contractually assume the obligation to pay the compensation premiums directly rather than merely having the cost included in the overall price for the job.¹²⁷

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¹²⁵ See *Ligget & Meyers Tobacco Co. v. Goslin*, 163 Md. 74, 160 Atl. 804 (1932); *Mulhall v. Nashua Mfg. Co.*, 80 N.H. 194, 115 Atl. 449 (1921); *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 158 Pac. 256 (1916).

¹²⁶ COLO. REV. STAT. ANN. § 81-9-1 (1953); see note 103 *supra* and accompanying text.

¹²⁷ It may be preferable to use the *Burke* approach, since the principal would be insulated from tort liability to the contractor's employees because he was paying the compensation premiums, and at the same time he could maintain the inconsistent position that the contractor was "independent" for purposes of preventing his being subjected to vicarious tort liability to remote third persons.

Unfair Competition and a Private Right of Action

The expansion of the implied liabilities from federal legislation has been of almost startling proportions in the last few years. Professor Loss has described this phenomenon as "the most surprising development in the whole area of civil liabilities" and concludes "that these [implied liabilities] may turn out to be far more significant than the express liabilities which Congress created."¹ In fact, judicial implication of a private civil cause of action from breach of a criminal statute has not been contingent upon statutory language, which affirmatively indicates that this is intended, but has frequently been allowed unless to do so would defeat manifest congressional purpose.² The implied actions allowed under the securities acts offer an excellent example of the broad scope of the trend. However, not all federal statutes have been held to create an implied cause of action. Most notable of the federal statutes which have not yet been held to create an implied cause of action is section 5 of the Federal Trade Commission Act.³ Although some writers have suggested that there is a national law of unfair competition,⁴ there has not been any noticeable change in the courts' approach to private suits under section 5, even in light of the recent expansion of the implied-liability doctrine. This note will make an examination of recent developments and their effect on a possible private action under section 5.

I. BACKGROUND

The Federal Trade Commission Act, and more particularly, section 5, was passed in conjunction with the Clayton Act in response to a demand for some remedial legislation to bolster the Sherman Antitrust Act.⁵ Congress, in using

¹ LOSS, *SECURITIES REGULATION* 1043 (1951). Professor Loss was speaking with reference to the securities acts, but the general doctrine of implied liabilities has received treatment by other writers. See 2 HARPER & JAMES, *TORTS* § 17.6 (1956); PROSSER, *TORTS* § 35 (3d ed. 1964); LOSS, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045-58 (1960); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); MORRIS, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Note, 77 HARV. L. REV. 285 (1963).

² *Wheeldin v. Wheeler*, 373 U.S. 647, 662 (1963) (dissenting opinion). The courts have further said that private liabilities will be implied unless a contrary legislative intent is evident. *Brown v. Bullock*, 194 F. Supp. 207, 224 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961).

³ Federal Trade Commission Act § 5(a)(1), as amended, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a)(1) (1958) states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

⁴ Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949); Wragg, *Private Suits Under the Sherman Act: The New Injury-to-Competitors Test*, 7 WAYNE L. REV. 535, 565 (1961).

⁵ As a result of *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), which implied the rule of reason into the Sherman Act, Congress became alarmed at the prospects of the varying judgments of different courts determining the reasonableness of any restraint of trade. To meet this objective the Clayton Act was passed specifically naming certain business practices as unlawful for which Congress felt the rule of reason should not apply. On the other hand, § 5 was passed by Congress to meet the demands of a growing, complex business community. To accomplish this objective, the term "unfair methods of competition" was not given a definite meaning, in order that the Federal Trade Commission might meet unfair practices as they arose. Through this method, it was hoped that unfair practices could be stopped in their inception before they became full-blown monopolies and Sherman Act violations. Congress had noted that restraints under the Sherman Act often came too late to be of benefit to the public. See 51 CONG. REC. 12145-49 (1914).

the phrase "unfair methods of competition" in section 5, meant to give the term a broader meaning than the simple common law passing-off situation (selling one's goods as the goods of a competitor), which up to then was the extent of the law of unfair competition.⁶ The courts, on the other hand, initially took a very restricted view of this phrase notwithstanding the contrary legislative history. The first case concerning section 5 to reach the Supreme Court was *FTC v. Gratz*,⁷ where the court said: "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. . . . They are clearly inapplicable to practices never heretofore regarded as opposed to good morals. . . ." ⁸ The Court, by limiting unfair practices to those previously defined, limited the application of section 5 to common law offenses. Later, in *FTC v. Raymond Bros.-Clark Co.*,⁹ the Supreme Court substantiated its prior position by expressly limiting the meaning of "unfair methods of competition" to that known at common law when it refused to enforce the Federal Trade Commission's cease and desist order because it was not shown that the practice complained of was "unlawful at the common law."¹⁰

The restrictive approach taken by the *Gratz* case was not destined to last forever and in the ensuing years the Court gradually reversed its position.¹¹

(remarks of Senator Hollis); 51 CONG. REC. 12024 (1914) (remarks of Senator Newlands). See generally HENDERSON, *THE FEDERAL TRADE COMMISSION* 1-48 (1927) (the classic work on the Federal Trade Commission); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 520-31 (1962) (an excellent article on the legislative history of § 5).

⁶ As originally proposed, § 5 used the phrase "unfair competition"; but, out of fear that the term would be limited to its common law meaning, Congress substituted the phrase "unfair methods of competition." This approach was apparently first suggested by Senator Hollis while debating the bill on the floor of the Senate. 51 CONG. REC. 12145 (1914). See also 51 CONG. REC. 14930 (1914) (remarks of Congressman Covington). The framers of the Federal Trade Commission Act pictured § 5 as an elastic phrase to meet unforeseen business conditions. "Otherwise," as Senator Newland pointed out, "if we attempted to define it we would leave out numerous practices that ought to be prohibited, and particularly the Protean forms of unfair competition that are likely continually to arise as one unfair practice after another is condemned by the law and by the court." *Id.* at 12938. See also *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 312 n.2 (1934). See generally HENDERSON, *op. cit. supra* note 5, at 33-38; Baker & Baum, *supra* note 5, at 531-42. On the other hand, the common law of "unfair competition" has been described as a limited concept applying primarily "to the palming off of one's goods as those of a rival trader." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531 (1935) (dictum); see, e.g., *Howe Scale Co. v. Wyckoff, Seamans, & Benedict*, 198 U.S. 118, 140 (1905); *Goodyear's India Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 604 (1888). The Supreme Court did point out in the *Schechter Poultry* case that the scope of the common law was extended in *International News Serv. v. Associated Press*, 248 U.S. 215 (1918) beyond the mere passing-off case. In *International News* the defendant had appropriated plaintiff's news and sold it as his own, thus going beyond the usual passing-off situation of selling one's goods for those of another. However, subsequent cases have not been so sweeping and, in fact, seem to have gone back to the limited concept of passing off. See *Upjohn v. Wm. S. Merrell Chem. Co.*, 269 Fed. 209 (6th Cir. 1920), *cert. denied*, 257 U.S. 638 (1921); *Benjamin T. Crump Co. v. J. L. Lindsay, Inc.*, 130 Va. 144, 107 S.E. 679 (1921). See also Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1311-15 (1940) (a good discussion of the common law of unfair competition).

⁷ 253 U.S. 421 (1920).

⁸ *Id.* at 427.

⁹ 263 U.S. 565 (1924).

¹⁰ *Id.* at 572-73.

¹¹ For instance, the Supreme Court in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), held that it was within a producer's legal right to refuse to sell goods to cus-

The leading case, utilizing a substantially broadened view of section 5, was *FTC v. R. F. Keppel & Bro.*¹² Relying heavily upon legislative history, the Supreme Court said, "neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories."¹³ The Court pointed out that the common law afforded a definition of unfair competition and, if Congress had wanted to restrict the application of section 5 to those methods of competition forbidden at common law, it would not have been a difficult feat to have done so.

But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which . . . does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"¹⁴

The Supreme Court later said, "what are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions" not limited by the common law definition.¹⁵

The *Keppel* case also liberalized the approach previously taken by the Supreme Court in *FTC v. Raladam Co.*,¹⁶ wherein it was held that there must be a finding that the unfair practices complained of substantially injured the business of a competitor. Without such a finding, the Court said, the Federal Trade Commission lacked jurisdiction to entertain the case, thus placing a serious limitation upon the scope of section 5. A Third Circuit decision,¹⁷ in commenting on the *Raladam* case, said that the Supreme Court had "emphasized competition and minimized public interest," thereby provoking much criticism.¹⁸ In the *Keppel* case, the Supreme Court recognized the Federal Trade Commission's jurisdiction without a showing of injury to competition. Congress subsequently adopted the *Keppel* case approach when it amended

tomers who will not resell at stipulated prices. However, three years later the Supreme Court in *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922), condemned as an unfair business practice the refusal of a producer to sell to customers who in turn sell at cut-rate prices. Although the Court said it followed the approach of the *Gratz* case, which had held that § 5 did not apply to activities never before declared unlawful, the Supreme Court nevertheless declared a previously valid business practice unlawful. The Court attempted to distinguish the *Colgate* case, but the only apparent difference was that the producer in *Beech-Nut* was better organized than the producer in *Colgate*. In *Beech-Nut* the producer had a system of special agents to detect customers who were selling at cut rates in order to compile a list of undesirables, whereas in *Colgate* the producer had no special system of detection. The trend started by *Beech-Nut* was eventually culminated in *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934).

¹² 291 U.S. 304 (1934).

¹³ *Id.* at 310.

¹⁴ *Id.* at 310-12.

¹⁵ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532-33 (1935).

¹⁶ 283 U.S. 643 (1931).

¹⁷ *Pep Boys — Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158 (3d Cir. 1941).

¹⁸ *Id.* at 160. The *Raladam* case has been criticized as leaving the consumer virtually unprotected by weakening, if not actually nullifying, the powers delegated to the Commission for the protection of the public and the consumer. See DERENBERG, *TRADE MARK PROTECTION AND UNFAIR TRADING* 172-73 & nn.20-22 (1936).

section 5 to read "unfair or deceptive acts or practices in commerce, are hereby declared unlawful"¹⁹ without mentioning the element of competition. This phrase was interpreted to show a legislative intent to allow the Federal Trade Commission to stifle unfair practices whether or not competition was adversely affected.²⁰ As a result, the Commission was then able to center its attention on the direct *protection of the consumer* while formerly it could protect him only indirectly through the protection of the competitor.²¹

Consonant with the *Keppel* case, the federal courts expanded the concept of unfair competition beyond the common law passing-off situation to include business practices which are contrary to the established public policy of the United States,²² and to business practices which are contrary to the policies of the Sherman,²³ Clayton,²⁴ and Robinson-Patman acts.²⁵ The term "unfair methods of competition" has thus become a flexible concept to be defined by "the myriad of cases from the field of business."²⁶

While the Supreme Court has become very liberal in the interpretation of the scope and definition of section 5, it has explicitly excluded any private actions brought before the Federal Trade Commission. In the leading case of

¹⁹ 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a)(1) (1958).

²⁰ *E.g.*, *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 441 (2d Cir.), *cert. denied*, 323 U.S. 753 (1944); *Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 643-44 & n.7 (3d Cir. 1941) (dictum).

²¹ *Pep Boys — Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 & n.15 (3d Cir. 1941). See also MacIntyre, *The Federal Trade Commission After 50 Years*, *TRADE REGULATION REPORTS* 61, 93 (1964); *Legislation*, 39 COLUM. L. REV. 238, 261-62 (1939).

²² *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934) (selling candy by the element of chance); *National Candy Co. v. FTC*, 104 F.2d 999, 1006 (7th Cir.), *cert. denied*, 308 U.S. 610 (1939) (selling candy by the use of a lottery scheme).

²³ See *FTC v. Cement Institute*, 333 U.S. 683, 689-95 (1948) (combination among cement manufacturers to restrict competition); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 454-55 (1922) (devised a system to eliminate price cutters).

²⁴ See *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 464 (1941) (combination among garment manufacturers to stop copiers of women's fashions); *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 733 (8th Cir. 1940) (manufacturer limiting distributors from handling competitive lines).

²⁵ *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962) (receiving disproportionate promotional allowances); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962) (operator of chain supermarkets unlawfully solicited advertising aid from suppliers). However, the extension of § 5 to Robinson-Patman Act violations has been severely criticized. See Comment, 1963 *DUKE L.J.* 145 n.6 (citing several articles). The main criticism on this extension is centered around the different policies of the Robinson-Patman Act and § 5. The Robinson-Patman Act tends to inhibit competition by stifling competitive prices, whereas § 5 was designed to insure competition. See, *e.g.*, *id.* at 151-53; Note, 13 *STAN. L. REV.* 657, 661 (1961).

²⁶ The Supreme Court in *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953), gave an excellent summary of the development of § 5 since the *Keppel* case. The Court said that:

The "unfair methods of competition," which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act . . . Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. . . . It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Act . . . as well as to condemn as "unfair methods of competition" existing violations of them.

Id. at 394-95.

FTC v. Klesner,²⁷ the Court said, "Section 5 . . . does not provide private persons with an administrative remedy for private wrongs. . . . A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the commission a complaint against the alleged wrongdoer."²⁸ The Court said that the Commission had jurisdiction only over unfair practices which affect the public interest and "the mere fact it is in the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial."²⁹ The basis for the Court's reasoning was drawn from the express language of the act³⁰ and from legislative history.³¹ In passing the Federal Trade Commission Act, Congress feared that if private actions were allowed the Commission would be swamped with petty claims. The courts have interpreted the language of the act and the legislative history to mean that when the courts can act "the machinery of the Federal Trade Commission . . . should [not] be set in motion for the settlement of private controversies."³² However, the courts have dismissed private actions brought before them holding that relief under section 5 must be sought from the Federal Trade Commission and not from the courts.³³ As a result, private parties have been left without a remedy since, as the act has been interpreted,³⁴ the Commission is without jurisdiction to hear private claims.

II. GROUNDS FOR RECOVERY

Whenever courts have implied a private cause of action from federal statutes, they have done so for a variety of reasons. The purpose of this section will be to make an examination of these theories for implying a civil remedy in order to determine their applicability to section 5 of the Federal Trade Commission Act.

²⁷ 280 U.S. 19 (1929).

²⁸ *Id.* at 25.

²⁹ *Id.* at 28.

³⁰ The statute provides that:

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof *would be to the interest of the public*, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges

Federal Trade Commission Act § 5(b), as amended, 52 Stat. 122 (1938), as amended, 15 U.S.C. § 45(b) (1958). (Emphasis added.)

³¹ Congressman Covington pointed out that the House amended § 5 to limit the Federal Trade Commission to act only in the public interest. He said that this amendment "prevents the commission from becoming a clearing house to settle the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts." 51 CONG. REC. 14930 (1914). See generally Malone, *Meaning of the Term "Public Interest" in the Federal Trade Commission Act*, 17 VA. L. REV. 676 (1931).

³² *Flynn & Emrich Co. v. FTC*, 52 F.2d 836, 838 (4th Cir. 1931).

³³ *E.g.*, *Moore v. New York Cotton Exch.*, 270 U.S. 593, 603 (1926); *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949); see Note, 43 YALE L.J. 480, 481 n.16 (1934).

³⁴ The idea of a "public wrong" or "public interest" has received a much more liberal interpretation in other antitrust legislation. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

In all cases allowing a private remedy, the statute has declared some act to be unlawful. Relying upon this factor, the courts have given various reasons for implying a civil remedy including a supposed finding of legislative intent. But, as Dean Prosser points out, this finding of a legislative intent is a "pure fiction," and he concludes that when an act does not provide a specific remedy the legislature either did not have a civil suit in mind, or deliberately failed to provide for it.³⁵ Dean Prosser further states that "perhaps the most satisfactory explanation is that the courts are seeking . . . to further the ultimate policy for the protection of individuals which they find underlying the statute . . ."³⁶ The first federal case to imply a private cause of action from a federal statute³⁷ was *Texas & Pac. Ry. v. Rigsby*,³⁸ which relied principally upon this rationale. The Supreme Court said, "a disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . ."³⁹ The SEC cases have relied principally upon this rationale when implying civil remedies. The dissent by Judge Clark in *Baird v. Franklin*,⁴⁰ provided a basis upon which implied private actions could be derived from securities legislation. This case was brought by a private party and involved an alleged violation of section 6(b) of the 1934 act.⁴¹ The majority of the court assumed that the court had jurisdiction to entertain a private action under the act, but dismissed the case on the merits. Judge Clark, on the other hand, dissented from the majority's view of the facts and would have allowed a private remedy. Since the majority had not treated the jurisdictional question at length, Judge Clark devoted a substantial portion of his dissenting opinion to a more thorough examination concerning the propriety of implying a private remedy.⁴² Judge Clark concluded that the purpose of the act would be furthered by allowing a private remedy. He said: "The fact that the statute provides no machinery or procedure by which the individual right of action can proceed is immaterial. It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach . . ."⁴³ Since this case, private actions have been implied from several sections of the SEC Act.⁴⁴

³⁵ PROSSER, TORTS § 35, at 192 (3d ed. 1964).

³⁶ *Id.* at 193.

³⁷ Federal Safety Appliance Act, 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-16 (1958).

³⁸ 241 U.S. 33 (1916).

³⁹ *Id.* at 39. However, with the passage of the Employers Liability Act it has been subsequently held that there is no private right of action under FSAA. See *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934); *Jacobson v. New York, N.H. & H.R.R.*, 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

⁴⁰ 141 F.2d 238, 240 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

⁴¹ 48 Stat. 886 (1934), 15 U.S.C. § 78f(b) (1958) (section requires registered exchanges to discipline members for unethical conduct).

⁴² See comment on the case in *Fratt v. Robinson*, 203 F.2d 627, 632 (9th Cir. 1953).

⁴³ *Baird v. Franklin*, 141 F.2d 238, 245 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

⁴⁴ For instance, § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958), which prohibits the use of manipulative and deceptive devices in securities transactions, has given rise to remedies for purchasers, *e.g.*, *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783

Although most of the activity with implied cases has occurred in the securities field, there is no rational basis for restricting the application of the doctrine to that area. In fact, private remedies have been implied from other federal statutes, for example, the Civil Aeronautics Act,⁴⁵ the Railway Labor Act,⁴⁶ and the Federal Communications Act.⁴⁷ The courts in implying a private action from federal legislation will look to the policies of the particular act, and if a private enforcement of the act will forward its purposes, the courts generally have been inclined to imply a remedy.

Section 5 of the Federal Trade Commission Act similarly declares certain practices to be unlawful.⁴⁸ The object of section 5 is to protect the general public from unfair and unlawful business practices.⁴⁹ It would appear, therefore, that section 5 fits the basic pattern of the previously considered statutes. However, before it can be concluded that a private action should be implied from section 5, other considerations must be made to determine whether the purposes of the act will be advanced.

A part of this determination is the consideration of the possible deterrent effect of a private action on unfair business practices. The theory of deterrence is that the additional penalty coupled with the private-party enforcement will

(2d Cir. 1951), and sellers, *e.g.*, *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960); *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) for violations of the act. Also, shareholders have been permitted to sue on the basis of alleged proxy-rule violations under the Securities Exchange Act of 1934 § 14(a), 48 Stat. 895 (1934), 15 U.S.C. § 78n(a) (1958). For a while there was a question whether a private action would be allowed under § 14(a). See *Howard v. Furst*, 238 F.2d 790, 793 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (where the court specifically left the question open); *Subin v. Goldsmith*, 224 F.2d 753, 765-66, 774 (2d Cir.), *cert. denied*, 350 U.S. 883 (1955). See also Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045-58 (1960) (for a criticism of these cases). But subsequent cases have explicitly allowed a private cause of action under § 14(a). *E.g.*, *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 208-09 (6th Cir. 1961); *Walsh & Levine v. Peoria & E. Ry.*, 222 F. Supp. 516, 519 (S.D.N.Y. 1963); *Brown v. Bullock*, 194 F. Supp. 207 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (1961). In addition, one case has recognized the right of a customer of an insolvent Arkansas broker to sue, under the control provisions of § 20(a) of the Exchange Act, 48 Stat. 899 (1934), 15 U.S.C. § 78t(a) (1958), the New York brokerage firm of which the Arkansas broker had been a wire correspondent for damages resulting from the latter's violation of rule X-10B-5. *Hawkins v. Merrill Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W.D. Ark. 1949).

⁴⁵ *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) (damages allowed for racial discrimination), 9 STAN. L. REV. 791, 104 U. PA. L. REV. 864; *Laughlin v. Riddle Aviation Co.*, 205 F.2d 948 (5th Cir. 1953) (damages received for wages lower than prescribed by the act); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961) (passenger allowed damages for discrimination between tourist and first-class reservations).

⁴⁶ In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944), the Supreme Court held that the Railway Labor Act imposed a duty on the union to represent all employees in the craft regardless of race, and recognized a private injunction and damage action against the union. The Court had earlier held that the statute imposed on the railroads a duty, enforceable by a private injunction action, to "treat" with their employees' certified representatives. *Virginia Ry. v. System Fed'n Ry. Employees*, 300 U.S. 515, 547 (1937).

⁴⁷ *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947).

⁴⁸ 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a)(1) (1958).

⁴⁹ Before the Wheeler-Lea Amendment, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a)(1) (1958), it could have been contended that the class of persons intended to be protected were only competitors; but after the amendment it is clear that not only are competitors to be protected but also the general public. See notes 20-22 *supra* and accompanying text.

increase the likelihood of compliance with the statute. In this way, the implied private action can provide direct relief for members of a class that the legislature sought to protect. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*⁵⁰ involved a private action by a shipper against a common carrier for misrouting shipments in violation of the Interstate Commerce Act. The Court said, "the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize 'cease and desist' proceedings before the Commission."⁵¹ In *Wills v. Trans World Airlines, Inc.*,⁵² the court, in sustaining a private action for violation of the Civil Aeronautics Act, said that "since the consequences which turn upon violation of a statute are considered as largely determining the extent of obedience, 'liability to private suit . . . may be as potent a deterrent as liability to public prosecution. . . .'"⁵³

Like the Interstate Commerce Commission, the Federal Trade Commission is faced with an extraordinary number of cases to handle (limited only by the budget of the Commission),⁵⁴ which results in considerable delay in the prosecution of unfair business practices.⁵⁵ With the expense and delay of an administrative proceeding, it can be seen why the Court in *Hewitt-Robins* thought it relevant to consider the deterrent effect of private actions in order to decrease the number of cease and desist proceedings before the administrative agency. Of course, before the rationale of the *Hewitt-Robins* case could be applied to unfair competition proceedings, a finding would have to be made to determine whether the allowance of a private action would actually help enforcement of the act or would be a hindrance to the administrative process.⁵⁶ But it does not seem that the problems faced by the Federal Trade Commission would be so different from those of the Interstate Commerce Commission that the deterrent effect of a private action should not be considered by the court.⁵⁷

⁵⁰ 371 U.S. 84 (1962).

⁵¹ *Id.* at 88.

⁵² 200 F. Supp. 360 (S.D. Cal. 1961).

⁵³ *Id.* at 364.

⁵⁴ This can be a very real limitation. As Paul Rand Dixon (who is the head of the Federal Trade Commission) pointed out, the Commission's printing cost alone for a recent case was \$50,000 which included more than \$6,000 for the printing of a 400-page brief. Dixon, *The Federal Trade Commission in 1963*, TRADE REGULATION REPORTS 18, 19 (1964).

⁵⁵ Dixon, *The Federal Trade Commission in 1961*, TRADE REGULATION REPORTS 16 (1962). Dixon points out that "on May 31, 1961, there were 2,519 pending investigations compared with 1,808 the year before, an increase of 39 per cent." *Id.* at 16 n.2. Faced with this tremendous workload, the Commission has been seeking ways to increase its capacity to handle the voluminous unfair-competition cases. As a result, the FTC has initiated new investigatory procedures, see *id.* at 16, an advisory-rule system, and other supplemental measures to help enforce compliance with the law against unwholesome and destructive trade practices. MacIntyre, *supra* note 21, at 99.

⁵⁶ This topic is more fully discussed in the next section. See note 99 *infra* and accompanying text.

⁵⁷ It is likely that the rapid expansion of the implied remedies from the securities cases has been because of the pressure placed on the courts by the Securities and Exchange Commission to allow such an action. The Commission has been convinced that such actions would not impede its administration and would be an effective deterrent to potential violators. See Loss, *supra* note 44, at 1056.

A further consideration made by the courts in determining whether the purpose of the federal statute would be advanced by allowing a private cause of action is the availability of a comparable common law or state statutory remedy. If the common law remedy is adequate, the courts will generally refuse to imply a private action.⁶⁸ On the other hand, if there is no comparable common law or state statutory remedy, the courts are more likely to imply a federal cause of action on the theory that not to do so would defeat the purpose of the federal statute. For example, in *Steele v. Louisville & N.R.R.*,⁶⁹ a private action was allowed under the Railway Labor Act against a union for failure to bargain without discrimination toward the minority of its members. The fact that the federal regulatory legislation created new duties without state analogies was a strong factor in the Court's decision. In addition, the Court was faced in the *Steele* case with a situation where the state court had ruled that the federal statute did not create a duty upon the union to bargain without discrimination. This ruling would have made it impossible for the act to be enforced in the state court, thus successfully defeating the aims of the federal legislation. Likewise, the court in *Wills v. Trans World Airlines, Inc.*⁷⁰ seemed to be concerned that there was no comparable state remedy. The court approvingly quoted *Bell v. Hood*⁷¹ as stating, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."⁷² Also, the lack of an analogous common law remedy supports the holding in *Reitmeister v. Reitmeister*,⁷³ that section 605 of the Federal Communication Act⁷⁴ imposes civil as well as criminal liability for publishing an intercepted telephone message.

In examining the availability of a state law of unfair competition, the effect of *Erie R.R. v. Tompkins*⁷⁵ should be considered. Since *Erie*, it has been consistently held that the law of unfair competition is a matter of state law.⁷⁶ This result has been severely criticized as having dealt a disastrous blow to the developing law of unfair competition for private suits.⁷⁷ Prior to the *Erie* decision, the federal courts functioned under the theory of *Swift v. Tyson*,⁷⁸

⁶⁸ See *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 216 F.2d 543, 544 (9th Cir. 1954), cert. denied, 349 U.S. 905 (1955); *Beury v. Beury*, 127 F. Supp. 786, 789-90 (S.D. W. Va. 1954), aff'd, 222 F.2d 464 (4th Cir. 1955), 103 U. PA. L. REV. 1098; cf. *Schuman v. Little Bay Constr. Corp.*, 110 F. Supp. 903 (S.D.N.Y. 1953).

⁶⁹ 323 U.S. 192 (1944).

⁷⁰ 200 F. Supp. 360 (S.D. Cal. 1961).

⁷¹ 327 U.S. 678 (1946).

⁷² *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 364-65 (S.D. Cal. 1961), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946).

⁷³ 162 F.2d 691 (2d Cir. 1947) (dictum).

⁷⁴ 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

⁷⁵ 304 U.S. 64 (1938).

⁷⁶ E.g., *Pechaur Lozenge Co. v. National Candy Co.*, 315 U.S. 666 (1942); *Franke v. Wiltschek*, 209 F.2d 493 (2d Cir. 1953). See cases collected in Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 283 n.72 (1946).

⁷⁷ See Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1299 (1940); Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition*, 42 COLUM. L. REV. 955 (1942); Note, *The Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma*, 60 HARV. L. REV. 1315 (1947).

⁷⁸ 41 U.S. (16 Pet.) 1 (1842).

where they were permitted to apply what was considered a federal common law rather than the various state laws. With the passage of the Federal Trade Commission Act, the federal courts continued to apply federal precedents from that act to private suits, thus building a respectable uniform law of unfair competition. This so-called body of federal law developed much farther than either the common law or any state law of unfair competition.⁶⁹ However, *Erie* was understood to force federal courts to follow state precedents of great antiquity and of doubtful present validity in private suits for unfair competition.⁷⁰ Even though many states do have legislation against unfair competition, many of these statutes, like section 5 of the Federal Trade Commission Act, make no provision for private recovery.⁷¹ Those that do are often plagued with procedural and substantive handicaps and as a result private suits are rarely brought.⁷² Furthermore, the conflict of laws problem created by *Erie* is practically unsolvable.⁷³ Therefore, it would appear that, insofar as the law of unfair competition is concerned, the available state remedy in most cases would be totally inadequate.

The state remedy may also be inadequate, not so much as a result of individual deficiencies, but because the problem is of a national nature. When this problem is coupled with the confusion of existing state remedies, it has been suggested that a uniform pattern of redress would be desirable to promote the policy of the regulatory scheme. Justice Frankfurter, in his dissent in *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*,⁷⁴ said that "to leave relief to the diverse and conflicting State law dealing with intercorporate relations would make for conflicting local administration of an important national problem."⁷⁵ This rationale has been used in sustaining implied actions from the Civil Aeronautics Act⁷⁶ and could, with equal validity, be applied to implied private actions under section 5 of the Federal Trade Commission Act.

Another factor considered by the courts in determining whether a private action would further the objective of a federal statute is the inability of the

⁶⁹ See note 6 *supra*.

⁷⁰ *E.g.* *Soft-Lite Lens Co. v. Ritholz*, 301 Ill. App. 100, 21 N.E.2d 835 (1939) (passing off is the whole of unfair competition); *Kaufman v. Kaufman*, 223 Mass. 104, 111 N.E. 691 (1916) (direct competition is essential to the tort); see Note, 56 HARV. L. REV. 298, 301 (1942).

⁷¹ See ILL. ANN. STAT. ch. 121½, §§ 188-96 (Smith-Hurd 1960).

⁷² In Utah, for instance, the few cases that have come before the supreme court have not been favorable to the state law of unfair competition. In 1956 the Utah Fair Trade Act was held unconstitutional because of price-controlling features. *General Elec. Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P.2d 741 (1956). And in 1962 the Utah Supreme Court held that a statute requiring petroleum retailers to post prices of motor fuels was unconstitutional. *Pride Oil Co. v. Salt Lake County*, 13 Utah 2d 183, 370 P.2d 355 (1962). As a result of unfavorable decisions the Utah Trade Commission has proceeded with caution in prosecuting unfair practices, and private actions, although specifically provided for, are nonexistent. See Note, *Antitrust and Unfair Trade Practice Regulation in Utah*, 8 UTAH L. REV. 339, 346-49 (1964).

⁷³ Chafee, *supra* note 67, at 1299-1300; Note, *The Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma*, 60 HARV. L. REV. 1315 (1947).

⁷⁴ 341 U.S. 246, 255 (1951).

⁷⁵ *Id.* at 263.

⁷⁶ *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499, 502 (2d Cir. 1956). Also, in public securities transactions, the typically interstate character of the activity makes uniform remedies more practicable.

administrative agency itself to grant private relief either in the form of an injunction or damages. The Supreme Court in *Steele v. Louisville & N.R.R.*,⁷⁷ in granting a private injunctive and damage action under the Railway Labor Act, said:

In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction.⁷⁸

In *Wills v. Trans World Airlines, Inc.*,⁷⁹ the court was influenced in granting a private remedy for damages by the fact that the Civil Aeronautics Board could only give orders for future compliance and could afford no redress for past violations.⁸⁰

Similarly, the Federal Trade Commission, under section 5, has not been given authority to grant a private action. However, even if it had the power to entertain a private suit it could only grant relief in the form of an injunction against future violations, much like the Civil Aeronautics Board, and could not award damages for past violations. Thus, the rationale of these cases could easily be applied to section 5.

III. GROUNDS FOR DENIAL

Since civil liability has not been implied from the violation of all federal regulatory statutes, it will be the purpose of this section to examine the various grounds for denial, emphasizing the application of these reasons to a possible private cause of action under section 5.

In nearly all the implied remedy cases from the securities legislation, the courts have considered the maxim *expressio unius est exclusio alterius*: the express authorization of a particular remedy in one section of a statute indicates that an omission of that remedy from other sections was intended by the legislature.⁸¹ Judge Clark, in his dissent in *Baird v. Franklin*,⁸² rejected this

⁷⁷ 323 U.S. 192 (1944).

⁷⁸ *Id.* at 207.

⁷⁹ 200 F. Supp. 360, 364 (S.D. Cal. 1961).

⁸⁰ See also the dissent in *Spirit v. Bechtel*, 232 F.2d 241, 252 (2d Cir. 1956), wherein it was argued that the inability of the agency to sue the wrongdoer favored implication of a private remedy under the Merchant Marine Act. *But see* *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 216 F.2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955). An implied remedy was rejected as unnecessary, even though the agency could afford no relief in damages but merely enjoin the misconduct. The court pointed out that a transport company operating without an ICC certificate of convenience and necessity can generally be brought to the Commission's attention before there has been any substantial injury to a competitor. However, this would not seem to be the case with § 5, since the Federal Trade Commission can only act if the public interest is substantially affected. *FTC v. Klesner*, 280 U.S. 19 (1929). Therefore, even if an unfair method of competition is brought to the Commission's attention, the practice could not be enjoined unless it was found to affront the public interest.

⁸¹ See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 4915-17 (3d ed. 1943).

⁸² 141 F.2d 238, 245 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

maxim as not being useful in modern statutory construction. He pointed out that the Supreme Court had recently taken a dim view of this maxim, and that courts are now inclined to "construe the details of an act in conformity with its dominating general purpose."⁸³ Moreover, the three sections which explicitly provide for civil remedies deal with only a small part of the field covered by the Securities Exchange Act.⁸⁴ Also, they allow a more liberal recovery than would be possible at common law, prescribe special rules as to the burden of proof, and have a short statute of limitations. Judge Clark could have construed these sections as merely reflecting an intention by Congress to modify the remedies which might otherwise be implied from these sections, and to leave unqualified the possible liability arising from violation of other sections of the act.⁸⁵ On the other hand, these sections could have been construed to mean that, if the sections which provide for private civil remedies would not have provided for a broader recovery than that at common law, the maxim would have been applied.⁸⁶ In fact, the court in *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*⁸⁷ interpreted Judge Clark's rejection of the maxim in just that way. The court in *Consolidated Freightways* applied the maxim to the Motor Carrier Act to deny a private cause of action where the express remedies provided for only criminal and injunctive relief brought by the administrative agency. However, this approach fails to consider the main ground for rejecting the maxim in the *Baird* case, that is, that old maxims will not be followed if found to defeat the general purpose of the statute.

Section 5, like the Motor Carrier Act, does not provide an explicit private remedy, but merely grants the administrative agency power to enjoin unfair business practices. While it is conceivable that the court could apply the

⁸³ *Ibid.* Judge Clark cited *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943), in which case the Supreme Court said:

Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . .

⁸⁴ §§ 9(e), 16(b), 18(a), 48 Stat. 890, 896, 897 (1934), 15 U.S.C. §§ 78i(e), 78p(b), 78r(a) (1958).

⁸⁵ Subsequent SEC cases have followed the approach of Judge Clark in the *Baird* case. See *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 208-09 (6th Cir. 1961) (refused to apply maxim to § 14(a)); *Fratt v. Robinson*, 203 F.2d 627, 631-32 (9th Cir. 1953) (refused to apply maxim to § 10(b)); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946); *Loss, The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1049-51, 1055 (1960); *Comment*, 59 YALE L.J. 1120, 1133-34 (1950). *Contra*, Note, 59 HARV. L. REV. 769, 779-80 (1946).

⁸⁶ *Cf. Downing v. Howard*, 68 F. Supp. 6 (D. Del. 1946), *aff'd*, 162 F.2d 654 (3d Cir. 1947), wherein the court applied the maxim to the Public Utility Holding Act to deny a private cause of action. *But see Goldstein v. Groesbeck*, 142 F.2d 422 (2d Cir. 1944), in which the court, through analogy to the SEC cases, allowed a private action under the Public Utility Holding Act. See also *Speed v. Transamerica Corp.*, 71 F. Supp. 457, 458 (D. Del. 1947), wherein the same judge who decided the *Downing* case distinguished that case from *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (recognized sellers right of action against buyer under rule X-10B-5) without discussion. If this distinction was made on the ground that in *Downing* there was a failure to prove damages (as in *Baird*), it would seem to be sound, but not if the distinction was made on the ground of the applicability of the maxim.

⁸⁷ 216 F.2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).

maxim to section 5 as it did in *Consolidated Freightways*, the sounder reasoning would suggest that the courts would follow the approach taken by the SEC cases. A more serious problem, however, could be the passage of the Lanham Act which specifically provides for a private civil action for false description or representation of goods to anyone aggrieved.⁸⁸ This act covers an important part of the law of unfair competition and its enactment could indicate that the legislature understood section 5 not to provide a private action. However, there is no legislative history to the effect that the legislature ever considered section 5 or thought it applicable. The use of negative implication is unsafe as a general rule of construction. While it expresses a possible reading of the legislature's will, a contrary reading is usually also plausible. It would seem, therefore, that the courts should not deny a private cause of action under section 5 solely on the basis of the maxim *expressio unius est exclusio alterius*, but should consider whether a private remedy would further the "dominating general purpose" of the act.

Some courts have found it difficult to create an implied private action when the administrative agency has primary jurisdiction. In *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*,⁸⁹ a private cause of action was rejected under the Federal Power Act on the ground that the administrative agency had primary jurisdiction over the issue of reasonableness of rates. The Court said that the Federal Power Commission had exclusive jurisdiction over rates and that since the Commission had not been given power to grant reparations neither could the Court, since the basis of the Court's decision in granting a private action would of necessity be the Commission's determination of reasonableness of rates. To hold otherwise, the Court reasoned, would allow the Commission to do indirectly what Congress had forbidden them to do directly.⁹⁰ However, this approach ignores the purpose of the doctrine of primary jurisdiction which is not to divide powers between the courts and agencies, but rather to determine which tribunal should take the initial action.⁹¹ The principle of the doctrine is to allow a court, in passing upon subject matter which is within the specialized field of an agency, to take advantage of whatever contributions the agency can make to the solution.⁹² Otherwise, parties subject to agency regulations may become subject to uncoordinated and conflicting requirements.⁹³ The fact that an agency is not authorized to grant reparations should not limit the power of the courts to do so, nor should it limit

⁸⁸ 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1958).

⁸⁹ 341 U.S. 246, 253-54 (1951).

⁹⁰ This same reasoning was again used by the Supreme Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 468-70 (1959), in which a private remedy was rejected for unreasonable rates under the Motor Carrier Act.

⁹¹ *E.g.*, *Federal Maritime Bd. v. Isbrandtsen, Inc.*, 356 U.S. 481, 498-99 (1958); *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

⁹² See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963); *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952).

⁹³ In fact, the case which first established the doctrine of primary jurisdiction, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907), said that if power existed in courts or juries to revise a published rate there could be no uniformity, and this "would render the enforcement of the act impossible." See also *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946).

the use of the doctrine of primary jurisdiction to obtain a ruling from an administrative agency.⁹⁴ This use of the primary jurisdiction doctrine was recognized by the Supreme Court in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*,⁹⁵ where a shipper was granted private recovery under the Motor Carrier Act for misrouting by a common carrier. The Court distinguished *T.I.M.E., Inc. v. United States*,⁹⁶ not on the ground of primary jurisdiction⁹⁷ but on the fact that for unfair rates, which was the issue of *T.I.M.E.*, there were adequate remedies available to shippers through the agency, and that a private remedy would merely hinder the administration of the act. But in the case of misrouting practices, as involved in *Hewitt-Robins*, the Court said that there was no statutory procedure to safeguard the shipper. The Court reasoned that a private action for misrouting would in no wise hamper the efficient administration of the act, but would have a healthy deterrent effect and would minimize cease and desist proceedings before the Commission.

It would appear, therefore, that the presence of primary jurisdiction in an administrative body should not, by itself, be sufficient to deny a private remedy in the courts. Moreover, the cases denying a private civil suit ostensibly on the sole ground of primary jurisdiction can possibly be justified on other considerations. For instance, it was pointed out by the Court in the *Montana-Dakota* case that if a private suit were allowed the parties intended to be protected by the Federal Power Act would receive no benefit.⁹⁸ And in *T.I.M.E.* the majority seemed to be impressed with the fact that a private suit would unduly hamper the administration of the act.⁹⁹ Thus, in deciding whether or not to allow a private remedy in a situation involving primary jurisdiction, a court must decide if the purpose of the act would be advanced by a private action and not summarily dismiss a case where it finds the presence of primary jurisdiction in an administrative body.

The decisions of appellate courts reviewing FTC unfair competition cases seem to indicate that they would apply the doctrine of primary jurisdiction to a private action implied from section 5.¹⁰⁰ It should be remembered, however, that the scope of review of an administrative agency's order is much more limited than a trial de novo before the court. And yet, even in this situation, the courts have not felt bound by the Commission's determination of what is

⁹⁴ *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 151 (1946); *United States v. Garner*, 134 F. Supp. 16 (E.D.N.C. 1955); *New York & New Brunswick Auto Express Co. v. United States*, 126 F. Supp. 215 (Ct. Cl. 1954); 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 19.07, at 40-41 (1958); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1059 (1964).

⁹⁵ 371 U.S. 84 (1962).

⁹⁶ 359 U.S. 464 (1959).

⁹⁷ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 89 (1962) (dissenting opinion).

⁹⁸ *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951).

⁹⁹ *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 479-80 (1959).

¹⁰⁰ In *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953), the Supreme Court held that "the precise impact of a particular practice on the trade is for the Commission, not the courts, to determine." *Id.* at 396. See also *Moore v. New York Cotton Exch.*, 270 U.S. 593, 603 (1926); *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 221 (D. Mass. 1949).

unfair competition.¹⁰¹ It would seem, therefore, that, in a trial de novo, the court, in deciding the relatively simple issue of what is unfair competition, would not find it necessary to seek an agency determination on whether a business practice is unfair. Furthermore, it could be forcefully contended that the Federal Trade Commission does not have primary jurisdiction over unfair business practices, since the act does not provide either that the Commission shall have exclusive jurisdiction or that the Commission shall undertake to pass upon private controversies. In fact, the Federal Trade Commission and the courts have concurrent jurisdiction over many issues.¹⁰² Thus, it would appear that the courts are as capable as the Federal Trade Commission in deciding the issue of what constitutes unfair competition, and would not find it necessary to apply the doctrine of primary jurisdiction in a private action under section 5.

A further possible ground for refusing a private cause of action is in the case of a criminal statute which is framed in broad terms with but light sanctions for enforcement. It is contended by some that to inflict a disproportionate civil punishment without the discretion of the agency would be in contravention of the purposes of the act.¹⁰³ However, this would not appear to be the situation under section 5, since the power of injunction can be invoked against violators by the Federal Trade Commission, and violators then become subject to heavy fines for failure to comply with a cease and desist order.¹⁰⁴ These penalties are certainly not light and would militate against the use of this rationale to refuse a private action under section 5. Also, so far as competitors are concerned, past damages are forgotten under a Federal Trade Commission cease and desist order; therefore, a private action for damages would be proportionate to the harm actually inflicted.

The case of *National Fruit Prod. Co. v. Dwinell-Wright Co.*¹⁰⁵ must also be considered, since this case squarely meets the issue of whether a private remedy should be implied from section 5. In this case the court denied a private action and concluded that "a national rule of unfair competition is peculiarly appropriate for consideration by the legislative rather than the judicial branch of the government."¹⁰⁶ There is some language in the case to indicate that the court

¹⁰¹ In *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 314 (1934), the Supreme Court said, "the determination of the Commission is of weight," but that the courts are to be the final arbitrators. Moreover, the Supreme Court initially took the position that the court, rather than the Commission, was to determine the meaning of § 5. *FTC v. Gratz*, 253 U.S. 421, 427-28 (1920). See also *FTC v. Sinclair Ref. Co.*, 261 U.S. 463, 475-76 (1923).

¹⁰² It is arguable that even in the case of concurrent jurisdiction the courts should defer to the agency whenever the law or facts are unclear, since many of the reasons for applying the doctrine of primary jurisdiction would seem to dictate such a result (guarding against conflicting results, utilizing the expertise of the agency). But see Jaffe, *supra* note 94, at 1050, where he points out that in the case of concurrent jurisdiction there is even less reason for the doctrine to be applied and usually merely results in an unnecessary complication of the proceedings. This would be especially true when the court is as capable of deciding the issue as is the administrative agency.

¹⁰³ See Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1056 (1960); Note, 77 HARV. L. REV. 285, 291-92 (1963).

¹⁰⁴ Federal Trade Commission Act § 5(b), (1), as amended, 52 Stat. 112, 114 (1938), as amended, 15 U.S.C. § 45(b), (1) (1958).

¹⁰⁵ 47 F. Supp. 499 (D. Mass.), *aff'd*, 140 F.2d 618 (1st Cir. 1942).

¹⁰⁶ *Id.* at 504.

was troubled by the possibility of primary jurisdiction being in the Federal Trade Commission,¹⁰⁷ but this factor alone should not preclude a court from considering the advisability of allowing a private action and, in all probability, primary jurisdiction does not exist. Perhaps a better explanation of the case can be derived from the date of the decision. Even though the concept of implied liability was recognized by 1942 when *National Fruit* was decided, the doctrine had only been sporadically applied to federal legislation.¹⁰⁸ The almost startling expansion of the doctrine, especially in the SEC cases, had not yet taken place.¹⁰⁹ It would seem that the restrictive approach taken by *National Fruit* should not prevent the consideration of a possible private action under section 5. Although the case does represent a possible alternative, that is, leaving the problem of a private action to the legislature, it gives little comfort to private individuals injured as a result of unfair competition. A more realistic alternative would be implied private liability under section 5.

IV. CONCLUSION

Section 5 declares unfair methods of competition to be unlawful in order to protect the general consumer. Implied liability from section 5 would advance this legislative purpose by its deterrent effect upon potential violators, by providing a remedy where there is no comparable state or administrative remedy, and by its unifying effect upon the now confusing law of unfair competition. But, even if it should be concluded that an implied action is not appropriate under section 5, it would seem that the great body of precedent developed under section 5 could be used to bolster and help unify the presently inadequate common law of unfair competition. This approach was suggested by the court in *Jacobson v. New York N.H. & H.R.R.*,¹¹⁰ in which the court rejected a private action under the federal Safety Appliance Acts. By way of dictum the court said that the state could certainly base a state private action upon the standard of the FSAA. The court pointed out that:

The federal Safety Appliance Acts, under the supremacy clause, are part of the law of the land, fully applicable within the borders of the state; and the state courts, in formulating their local rules of tort liability, might well give the same significance to a breach of a penal act of Congress that they would give to a breach of a similar act of their state legislature.¹¹¹

¹⁰⁷ *Ibid.*

¹⁰⁸ The first federal case to recognize an implied private remedy was *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916). However, this case was rendered moot by the subsequent passage of the Employers Liability Act. See note 39 *supra*. Implied actions had been recognized from the Railway Labor Act before the *National Fruit* case. *Virginian Ry. v. System Federation Ry. Employees*, 300 U.S. 515 (1937). But even the leading cases under this act were not decided until after *National Fruit*. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

¹⁰⁹ The first case under the securities legislation was *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

¹¹⁰ 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

¹¹¹ *Id.* at 158.

Even though this procedure is recognized in the courts and could apply equally well to private suits based on precedents from section 5, the fact that state courts would not be required to follow this procedure would in all probability leave the state of the common law of unfair competition in its present chaotic condition. In the absence of any specific legislation, section 5 offers a much-needed remedy to private parties injured as a result of unfair competition.¹¹² The implying of a civil liability from section 5 will thus advance the general purposes of the act.

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¹¹² Another possible alternative would be for a private litigant to bring an unfair-competition action under § 1 of the Sherman Act. For a private party this procedure has the advantage of treble damages. However, it is this feature of a § 1 violation that has caused the greatest criticism for allowing a private unfair-competition action under § 1. Wragg, *Private Suits Under the Sherman Act: The New Injury-to-Competitors Test*, 7 WAYNE L. REV. 535 (1961). Nevertheless, the federal courts appear to have accepted this approach where a conspiracy exists. *Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, — F.2d — (10th Cir. 1965). Still another alternative would be a prima facie tort action for intentional unfair-competitive practices. See generally Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM. L. REV. 196 (1946); *Developments in the Law — Competitive Torts*, 77 HARV. L. REV. 888 (1964).

An Appraisal of the Utah Statute of Frauds

It has been said that the Statute of Frauds is now "better adapted to our needs than when it was first passed,"¹ but there is a wealth of adverse criticism toward the statute which condemns it as an anachronism and an "excrescence of the common law."² Although a few American jurisdictions have made important revisions in the statute and in 1954 the greater part of the English Statute of Frauds was repealed, in most jurisdictions the statute remains essentially the same as the original act of 1677. In Utah, for instance, the statute has not been altered since the turn of the century except in connection with the enactment of the Uniform Sales Act and the Uniform Commercial Code. It seems probable that the Utah experience may be representative in many respects of general attitudes toward the statute. The following discussion outlines the history of the Utah statute and surveys the principles by which the Utah court has since been guided in averting harsh effects in application of the statute. In consideration of the Utah experience and as well in light of more general considerations, the statute is then evaluated in terms of its useful functions and effects.

I. HISTORY

By the time the United States had claimed its independence from England, the working elements of the Statute of Frauds had been reduced to sections four and seventeen of the original act of 1677.³ Even these had been eroded by the judiciary until the exceptions and limitations were perhaps more numerous than the applications. Despite this apparent dissatisfaction with the statute, one by one the American states began to incorporate some version of the English act into their legal systems. Unfortunate as this may seem in retrospect, the automatic incorporation of the statute probably seemed at that time the most reasonable course of action. The well-developed body of case law surrounding the statute made it almost a part of the common law⁴ and consideration of the statute on its merits may well have appeared as futile a gesture as a reappraisal of the rule of offer and acceptance.

A. *The First National Bank Case*

Utah was among those states which originally adopted the statute by judicial decision⁵ rather than legislative enactment.⁶ In *First Nat'l Bank v. Kinner*,⁷

¹ Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

² Drachsler, *The British Statute of Frauds — British Reform and American Experience*, 3 International & Comparative L. Bull., Dec. 1958, pp. 24, 25; Willis, *The Statute of Frauds — A Legal Anachronism*, 3 IND. L.J. 528 (1928).

³ Statute of Frauds, 1677, 29 Car. 2, c. 3. The history of the Statute of Frauds is set out in 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 379-97 (1924).

⁴ See 2 CORBIN, CONTRACTS § 278 (1950).

⁵ New Mexico, whose court adopted the English statute in 1888, *Childers v. Talbott*, 4 N.M. (4 Gild., E.W.S. ed.) 168, 16 Pac. 275 (1888), still has no actual legislation on the subject.

⁶ The legislative route was taken by most states. *E.g.*, ARIZ. REV. STAT. ANN. § 44-101 (1956); WYO. STAT. ANN. § 16-1 (1957). In Maryland, however, the English

defendant set up the Statute of Frauds as a defense to a claim on a note which he had guaranteed. Although the legislature had not yet acted, the court declared that plaintiff's claim was barred by England's Statute of Frauds which it held had been received in Utah as part of the common law. The court did not concern itself with whether or not it was appropriate to adopt English statutory law as well as common law, nor did it give consideration to the merits of the Statute of Frauds. Instead, the court discussed whether the applicable law was that of Mexico, whose possession the territory had been some twenty-five years before,⁸ or whether the people had "tacitly agreed upon the maxims and principles of [the] common law."⁹ The possibility that the correct course of action would have been to apply neither the English nor the Mexican statutes seems to have evaded the court's attention; and, since it apparently found the "alien institutions of an outlying Mexican department"¹⁰ unappealing, the Statute of Frauds became almost summarily a part of the law of Utah.

B. Development of the Utah Statute

By the time the next Statute of Frauds question arose, the Utah Legislature had enacted the Statute of Frauds of 1876 which contained all but one of the major provisions of the English Statute of Frauds of 1677.¹¹ The Utah version included sections dealing with the sale and lease of land, promises in consideration of marriage, contracts not to be performed within one year of the making, guarantees of debts, and sales of goods of a value over 300 dollars.¹² The only provision of the English statute not included in the Utah act was that dealing with promises of an executor to answer damages from his own estate.¹³ The Utah act also contained innovations apparently intended to clarify or improve on the English act, most notable of which were the sections exempting from the act the disposition of "real estate by last will and testament" and stating that no provision of the act should be construed to "abridge the powers of courts to

statute was adopted constitutionally, MD. CONST., Declaration of Rights, art. 5, *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459 (1900).

Even before the Statute of Frauds became part of Utah law by virtue of the *First Nat'l Bank* case, the legislature had passed an enactment which was later to become a provision of the Utah statute. It was passed in 1863 as part of a twenty-two-section chapter on telegraph companies and declared that communications sent by telegraph were deemed to be in writing. Utah Laws 1863, § 11, at 10. Since there was no Statute of Frauds at the time of its enactment, it is likely that its original purpose had nothing to do with the statute. Nevertheless, at the present time it is included among the provisions of the Utah Statute of Frauds. UTAH CODE ANN. § 25-5-7 (1953).

⁷ 1 Utah 100 (1873).

⁸ When the Mormon pioneers first arrived in Salt Lake Valley, the area that is now Utah was still a possession of Mexico. It was not ceded to the United States until February 2, 1848. 1 ALTER, UTAH THE STORIED DOMAIN 345-46 (1932) (quoting the *Deseret News* of July 30, 1862).

⁹ *First Nat'l Bank v. Kinner*, 1 Utah 100, 107 (1873).

¹⁰ *Ibid.*

¹¹ The court was not presented with another Statute of Frauds question until fourteen years after the *First Nat'l Bank* case. *Wasatch Mining Co. v. Jennings*, 5 Utah 243, 15 Pac. 65 (1887).

¹² Comp. Laws of Utah, tit. 15, §§ 1010-19 (Smoot 1876). The title of this act was "An Act to Punish Frauds" and it contained provisions dealing with fraudulent conveyances as well as the Statute of Frauds.

¹³ Statute of Frauds, 1677, 29 Car. 2, c. 3, § 4(1).

compel the specific performance of agreements in case of part performance thereof."¹⁴ The latter provision apparently was a broad statutory articulation of the judicially developed doctrine of part performance.¹⁵ Another provision of the act exempted the arising or extinguishing of any trust "by implication or operation of law."¹⁶ This seems to have been a product of section 8 of the English act¹⁷ which in that country, oddly enough, had already fallen into desuetude.¹⁸ An important change from the English act was a requirement of section 1010, dealing with interests in land, that a subscribing agent be appointed in writing.¹⁹ The English act²⁰ and, as well, the other provisions of the Utah act required only that the instrument or memorandum be subscribed by a party's "lawful agent."²¹

The precise derivation of Utah's first enactment of the Statute of Frauds is uncertain, but it seems probable that several sections were derived from either the California or Colorado provisions.²² The source of the second enactment seems clearly to be California law. Sections 1206 through 1210 of the Laws of Utah 1884 were exactly the same as section 279 and sections 1971 through 1974 of the *California Code of Civil Procedure* of 1872. While this obviously is not conclusive proof of their derivation, the fact that most of Utah's neighbors either did not yet have statutes of frauds²³ or that their statutes were constructed differently²⁴ adds credence to this theory.

In connection with the incorporation of the California act there occurred a curious duplication. The sections of the California Code covered largely the

¹⁴ Comp. Laws of Utah, tit. 15, § 1011 (Smoot 1876).

¹⁵ See generally Note, *The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah*, 9 UTAH L. REV. 91 (1964).

¹⁶ Comp. Laws of Utah, tit. 15, § 1011 (Smoot 1876).

¹⁷ Compare Statute of Frauds, 1677, 29 Car. 2, c. 3, § 8.

¹⁸ Cf. Note, 40 CORNELL L.Q. 581, 582 (1955).

¹⁹ Comp. Laws of Utah, tit. 15, § 1010 (Smoot 1876).

²⁰ Compare the last phrases of the Statute of Frauds, 1677, 29 Car. 2, c. 3, §§ 4, 17, with Comp. Laws of Utah, tit. 15, § 1019 (Smoot 1876).

²¹ Comp. Laws of Utah, tit. 15, § 1019 (Smoot 1876); see 2 CORBIN, CONTRACTS §§ 525-26 (1950).

²² Compare Comp. Laws of Utah, tit. 15, §§ 1010, 1011, 1014 (Smoot 1876), with Comp. Laws of Cal. 1853, ch. 47, §§ 6, 7, 12 and Colo. Rev. Stat. ch. 37, §§ 6, 7, 12 (1868).

In his message to the legislative assembly, 22d session, 1876, Governor Emery, who apparently was not aware of the *First Nat'l Bank* case, said:

[T]here is an entire absence of a Statute of Frauds in this Territory. It is believed that in every State and every Territory of the Union, except Utah, such a statute exists. All these statutes are based, in all their essential features, upon the celebrated English Statute of Frauds, passed in the year 1677. The experience of that country, as well as that of our own, has shown the wisdom of that act. It would be safer, and I advise the adoption of a Statute of Frauds from some other State in the Union, which has received judicial interpretation, rather than attempt a new and untried law.

22 JOURNALS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH 30 (1876). In the record of that assembly, however, there is no indication of which, if any, state statute acted as a guideline for the Utah act. *Id.* at 181-82, 185, 190, 232-33, 235, 252-53.

²³ New Mexico was one of these states, see *Childers v. Talbott*, 4 N.M. (4 Gild., E.W.S. ed.) 168, 16 Pac. 275 (1888); and Arizona was another, see ARIZ. REV. STAT. ANN. § 44-101 (1956) (historical note).

²⁴ WYO. STAT. ANN. § 16-1 (1957).

same area as Utah's act of 1876 but for some reason, when enacting these new laws, the Utah Legislature failed to repeal the old ones. Consequently, Utah had two separate, distinct, and in some respects conflicting statutes of frauds in effect at the same time. Generally speaking, the differences between the two acts were small, but there was one striking conflict between the two sections dealing with sales of goods. In one section the dividing line between contracts within the statute and those without was 300 dollars,²⁵ while in the other section the line was 200 dollars.²⁶ This discrepancy was soon settled in *Hudson Furniture Co. v. Freed Furniture & Carpet Co.*,²⁷ where the court applied the doctrine of repeal by implication to eliminate the older section. The court further indicated that, whenever the two acts conflicted, the act of 1884 should be applied.²⁸

This statutory dichotomy lasted until 1898,²⁹ when at last the conflicts were resolved and the major portion³⁰ of the duplications were removed by the legislature. Apparently there was little or no reevaluation of the statute at that time, however, for the provisions were not rewritten and only where there were two clearly incompatible sections was one repealed. Surviving this process was a provision relating to *contracts* for the conveyance of interests in land (as opposed to *conveyances* of interests in land),³¹ a statutory version of the common law exceptions to the guarantee provision,³² and a section which required a writing to "charge a person upon a representation as to the credit of a third person."³³

C. Analysis

Throughout the history of the Utah Statute of Frauds this important law appears to have had very little consideration on its merits. The *First Nat'l Bank* case introduced the statute into Utah law without so much as a word's analysis. It seems to have been assumed by the court that the adoption of English law compelled the acceptance of statutes as well as case law. Perhaps the most thought given any of the legislative versions of the statute was accorded the act of 1876. It was primarily a rewording of the English act, and was, at least in part, taken from California and Colorado statutes; but it differed in substance from these acts enough to evidence a modicum of consideration. There are circumstances surrounding the act of 1884, however, from which one can easily draw the opposite conclusion with regard to that

²⁵ Comp. Laws of Utah, tit. 15, § 1015 (Smoot 1876).

²⁶ Utah Laws 1884, ch. 55, § 1208(4).

²⁷ 10 Utah 31, 36 Pac. 132 (1894).

²⁸ *Id.* at 35, 36 Pac. at 133.

²⁹ Utah statutes were codified officially in Revised Statutes of Utah 1898. The session laws between 1884 and 1898 give no indication of any revision of the Statute of Frauds, therefore it is assumed that the conflicts were resolved in the revision of 1898.

³⁰ Not all the duplications were eradicated. In one instance the revision merely relocated the sections. Compare Utah Rev. Stat. § 1974 (1898), with Utah Rev. Stat. § 2461 (1898).

³¹ Utah Rev. Stat. § 2463 (1898).

³² Utah Rev. Stat. § 2471 (1898).

³³ Utah Rev. Stat. § 2468 (1898).

act. The act of 1884 was taken directly from the California Code without even a word change, and the fact that the existing provisions of 1876 were not repealed might be indicative that the legislature was unaware of their existence.³⁴ Even in 1898, when the conflicts were resolved, there still appears to have been no reevaluation of the statute. Differences were eliminated by simply striking out several sections, and no provisions were eliminated which did not have directly conflicting counterparts. The result was a statute replete with verbiage and redundancies. It took the 1898 Utah Legislature 349 words³⁵ to say the same thing that the British Parliament of 1677 had said in 119 words.³⁶ Moreover, with the exception of the sale-of-goods section,³⁷ the Utah Statute of Frauds has undergone only a few minor changes from 1898 to the present time. No doubt, in statutory drafting, brevity is not always a virtue, but the lack of it in this particular instance, together with the factors mentioned above, is at least some indication of an absence of the analysis that a law as important as the Statute of Frauds should have undergone.

II. THE COURT'S GENERAL APPROACH TO THE STATUTE AND ITS USE OF AMELIORATING DOCTRINES

A. Statutory Construction

The purpose of the Statute of Frauds has for many years been the subject of considerable controversy. The English statute of 1677 purported to be "An Act for the Prevention of Frauds and Perjuries,"³⁸ and this is generally accepted to have been the primary motivating force for its enactment.³⁹ It has been suggested, however, that its major purpose was "to restrict the use of informal transactions,"⁴⁰ and some modern writers have contended that, if there is justification for the statute's present existence, it is to encourage greater certainty in contracting.⁴¹ Others have asserted that the statute reflects the desirability of enforcing only those agreements which have been entered with the deliberateness generally associated with the written word.⁴² Although the

³⁴ The statute in question was enacted as part of a comprehensive code (1288 sections) of civil procedure, Utah Laws 1884, ch. 55. That the Statute of Frauds provisions were buried very deeply therein is also indicated by the fact that nothing was done to resolve this oddity until 1898.

³⁵ This figure is exclusive of the enacting clause and section headings. It is inclusive of only those sections that are a paraphrase of the English Act of 1677. Utah Rev. Stat. §§ 2461, 2463, 2467, 2469, 2478 (1898).

³⁶ This figure is calculated exclusive of the enactment clause. 29 Car. 2, c. 3, §§ 4, 17.

³⁷ The sale-of-goods section was repealed about nineteen years later in favor of the comparable section of the Uniform Sales Act, Utah Laws 1917, ch. 121, § 4, at 396. Very recently it has again been changed by enactment of the Uniform Commercial Code. UTAH CODE ANN. §§ 70A-1-101 to -10-104 (Supp. 1965).

³⁸ Statute of Frauds, 29 Car. 2, c. 3.

³⁹ E.g., CORBIN, CONTRACTS § 275, at 2-3 (1950); Drachsler, *The British Statute of Frauds—British Reform and American Experience*, 3 International & Comparative L. Bull., Dec. 1958, pp. 24-25.

⁴⁰ Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. Rev., April 1947, pp. 174, 178.

⁴¹ Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747-48 (1931).

⁴² Note, 40 CORNELL L.Q. 581, 582-83 (1955).

Utah court has often asserted that the statute should not be applied in a way which would perpetrate rather than prevent fraud,⁴³ it has left any speculation as to the precise purpose of the statute to the academicians. Instead of seeking some imaginary intent of the legislature, the court draws from precedent generated in its own and other jurisdictions and applies the statute much as if it were a principle of the common law.⁴⁴

Similarly, the court's general attitude toward construing the language of the statute is consonant with the view that more than 200 years of case law have settled its terms beyond any need for continued analysis.⁴⁵ There is a discernible distinction, however, between the court's treatment of provisions of the statute which were derived from the English act of 1677⁴⁶ and those which are more or less innovations.⁴⁷ In the former instance, the court generally cites the applicable section⁴⁸ and often quotes specific language;⁴⁹ but the meaning and effect of the statute are consistently ascertained, not by analysis of the language of the particular Utah provision, but by reference to case law or secondary authority.⁵⁰ On the other hand, those provisions of the Utah statute that were not derived from the act of 1677 are treated much the same as any other statute which has been adopted in wide variations by other jurisdictions. The language of the statute is considered and case law depended upon by the court is chosen only from those jurisdictions having statutes worded similarly to the Utah provision.⁵¹

B. Substantive or Procedural

In England it is well settled that the Statute of Frauds is a procedural rule which is not concerned with the validity of contracts but merely their enforceability.⁵² Although most American courts accept the proposition that contracts within the statute are voidable rather than void,⁵³ there is diverse opinion as to whether the statute is substantive or procedural.⁵⁴ Professor Corbin has advocated that, regardless of the language of the various statutes, all affect the sub-

⁴³ *E.g.*, *James Mack Co. v. Bear River Milling Co.*, 63 Utah 565, 573, 227 Pac. 1033, 1036 (1924); *Bracken v. Chadburn*, 55 Utah 430, 437, 185 Pac. 1021, 1023 (1919).

⁴⁴ See 2 CORBIN, *CONTRACTS* § 278 (1950).

⁴⁵ *Ibid.*

⁴⁶ UTAH CODE ANN. §§ 25-5-1, -3, -4, -9 (1953); UTAH CODE ANN. § 60-1-4 (Repl. vol. 1961).

⁴⁷ UTAH CODE ANN. §§ 25-5-2, -4(5), -5 to -8 (1953).

⁴⁸ *E.g.*, *Budge v. Barron*, 51 Utah 234, 239, 169 Pac. 745, 747 (1917); *Jackson v. Dallin*, 47 Utah 312, 314, 152 Pac. 341, 342 (1915).

⁴⁹ *E.g.*, *Sugar v. Miller*, 6 Utah 2d 433, 434, 315 P.2d 862, 863 (1957); *Campbell v. Nelson*, 102 Utah 78, 83, 125 P.2d 413, 415 (1942).

⁵⁰ *E.g.*, *Thompson v. Cheesman*, 15 Utah 43, 48 Pac. 477 (1897); *Darke v. Smith*, 14 Utah 35, 45 Pac. 1006 (1896).

⁵¹ *E.g.*, *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335 (1947); *Lee v. Polyhrones*, 57 Utah 401, 195 Pac. 201 (1921).

⁵² *Lorenzen, The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 311-14 (1923).

⁵³ *Warder v. Hutchinson*, 69 Cal. App. 291, 231 Pac. 563 (Dist. Ct. App. 1924); *Wolfe v. Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938); see 2 CORBIN, *CONTRACTS* § 294, at 72 (1950).

⁵⁴ *Lorenzen, supra* note 52, at 314-18.

stantive rights of individuals and should be treated accordingly.⁵⁵ This also appears to be the position of the Utah court, although it has never actually discussed the question.⁵⁶ Despite the fact that the court has occasionally referred to the statute as "an evidentiary barrier"⁵⁷ or as being a "rule of evidence,"⁵⁸ in actual practice it is treated as substantive.⁵⁹ This is evident in cases where the court hears evidence of the oral contract and other pertinent matters, then, with all things considered, decides whether the statute should be applied. The confusion arises, however, in instances in which the court finds it necessary to exclude evidence of the oral contract altogether. It is in this type of situation that the phrase "rule of evidence" is likely to be heard in reference to the statute. Although it may be correct to say that certain evidence is inadmissible because of the Statute of Frauds, it would be more accurate and surely more illuminating to say that it is inadmissible because the Statute of Frauds renders it immaterial. Thus, when the statute is asserted as a defense and there is no allegation of part performance or some other doctrine which might satisfy, or take the matter out of, the statute, any evidence which tends to prove the existence of the oral contract is immaterial and consequently inadmissible, since, even though the contract were proven, it would be unenforceable because of the Statute of Frauds.

C. *The Ameliorating Doctrines*

1. *The tacit doctrines.* The court often appears to take a very subjective attitude in applying the Statute of Frauds to the particular facts of a case. This attitude and the factors of which it is comprised will be referred to in this discussion as the "tacit doctrines" for ameliorating the statute. There is a dearth of concrete examples of this doctrine, but a reading of the entire body of Utah Statute of Frauds cases leaves an unmistakable impression that it is an important consideration in evaluating the court's approach to the statute. An example is *Bracken v. Chadburn*,⁶⁰ where the decision was ostensibly based on plaintiff's detrimental reliance and what appeared to be little more than nebulous evidence of an oral agreement made eleven or twelve years before the trial. The court seemed to be as concerned with defendant's unfaithful demeanor toward his friends as with the more legalistic aspects of the case. Its displeasure with defendant's comportment was expressed when it commented on his silence during the trial. "He [defendant] did precisely what might be

⁵⁵ 2 CORBIN, CONTRACTS § 294, at 72 (1950).

⁵⁶ The court has considered the statutes of frauds of other states, however, and in each instance has held them to be substantive. *Briggs v. Hanks*, 16 Utah 2d 138, 396 P.2d 871 (1964) (Colorado statute); *Jackson v. Jackson*, 122 Utah 507, 252 P.2d 214 (1953) (California statute).

⁵⁷ *Latses v. Nick Floor, Inc.*, 99 Utah 214, 225, 104 P.2d 619, 624 (1940) (concurring opinion).

⁵⁸ *Le Vine v. Whitehouse*, 37 Utah 260, 269, 109 Pac. 2, 6 (1910), citing POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 75, at 110 (2d ed. 1897).

⁵⁹ The Statute of Frauds differs in one respect from most substantive rules. It must be affirmatively pleaded or it is deemed waived. *Kilpatrick-Koch Dry-Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629 (1896); *Lauer v. Richmond Co-Op. Mercantile Institution*, 8 Utah 305, 31 Pac. 397 (1892).

⁶⁰ 55 Utah 430, 185 Pac. 1021 (1919).

expected of a man who would deliberately betray a trust reposed in him by his neighbors.”⁶¹ This highly subjective appraisal of defendant’s personal conduct appears to have been an important factor in the court’s decision to preclude defendant from asserting the Statute of Frauds.

Naturally, the factor which may most easily stir the court’s equitable impulse is a clear showing that an oral contract has actually been made. When the contract and its terms are proven to the court’s satisfaction, there is a discernible proclivity on the part of the court to require less in the way of proving the elements of some doctrine which will satisfy or take the case out of the statute.

The clearest proof of a contract, of course, is an admission by the parties; and in some jurisdictions this in itself is enough to take the case out of the statute.⁶² Utah does not accept this rule,⁶³ but there appears to be a more than coincidental correlation between admissions of the contract and findings of enforceability. The first Utah case of this kind was *Lauer v. Richmond Coop. Mercantile Institution*.⁶⁴ The court held that, when an oral contract is admitted in the pleadings, the statute must also be asserted at that time or the right to do so is thereafter waived. In another case,⁶⁵ the defendant had asserted the statute as a defense to an oral contract but had counterclaimed for money due him under the same contract. The court said, “defendant was hardly in a position to insist on the statute as a bar to the action, or to urge that the contract was unilateral and binding upon the defendant only.”⁶⁶ An admission by defendant has also been used to supply the definite description of land which was lacking in fragmentary memoranda.⁶⁷ Surely the Statute of Frauds was never intended to bar contracts which have in fact been made and the terms of which are undisputed. The court has displayed its reluctance to bar such contracts and apparently will enforce them when there is an opportunity to do so on other grounds. Nevertheless, if other grounds are not alleged, the court will apply the statute although the existence of the contract is stipulated.⁶⁸

The court is also particularly amenable to plaintiff’s point of view when the contract and its terms are proven with substantial certainty. This can probably be best illustrated by a comparison of two cases having similar factual circumstances. In *Price v. Lloyd*,⁶⁹ the statute was successfully interposed as a defense to an oral contract; while in *Brinton v. Van Cott*,⁷⁰ on much the same facts,

⁶¹ *Id.* at 436, 185 Pac. at 1023.

⁶² *E.g.*, *Sealock v. Hackley*, 186 Md. 49, 45 A.2d 744 (1946); 2 IOWA CODE § 622.34 (1958). As of January 1, 1966, this is also the rule in Utah under the sale-of-goods provision of the Uniform Commercial Code. UTAH CODE ANN. § 70A-2-201(3) (b) (Supp. 1965).

⁶³ See *Woolley v. Loose*, 57 Utah 336, 194 Pac. 908 (1920).

⁶⁴ 8 Utah 305, 31 Pac. 397 (1892).

⁶⁵ *Abba v. Smyth*, 21 Utah 109, 59 Pac. 756 (1899).

⁶⁶ *Id.* at 119, 59 Pac. at 759.

⁶⁷ *Leonard v. Woodruff*, 23 Utah 494, 65 Pac. 199 (1901).

⁶⁸ *Woolley v. Loose*, 57 Utah 336, 194 Pac. 908 (1920); *cf.* *Briggs v. Hanks*, 16 Utah 2d 138, 396 P.2d 871 (1964).

⁶⁹ 31 Utah 86, 86 Pac. 767 (1906).

⁷⁰ 8 Utah 480, 33 Pac. 218 (1893).

the contract was held to be specifically enforceable. In both cases a decedent had solicited an agreement whereby plaintiff was to care for him during his remaining years in return for certain real property to be left plaintiff by will. Evidence was clear that in each case plaintiff had carried out his task satisfactorily and it appeared that the care he gave the decedent had been rendered at great personal hardship to him. It is difficult to distinguish the cases on any of the essential facts, but in *Price* the court did not consider that the contract had been proven with sufficient clarity,⁷¹ while in *Brinton* the court was evidently well satisfied with the sufficiency of proof.⁷² In both cases there were lengthy discussions of equitable estoppel, part performance, and the general equities of the situation, but, had the contracts in each case been proven with the same clarity, the results, in all probability, would also have been the same.⁷³

2. *The traditional doctrines.* Very soon after the Statute of Frauds was enacted in 1677 the courts began to develop special exceptions, such as the doctrine of part performance and the leading-object rule.⁷⁴ These well-settled exceptions to the statute will be referred to in this discussion as the "traditional doctrines." They are applicable only to the Statute of Frauds and are to be distinguished from the "universal doctrines," such as equitable estoppel and restitution, which are applicable to many areas of the law. They can be grouped into three general categories: (1) those which are based on a very narrow construction of the language of the statute, (2) those which are primarily evidentiary in nature, and (3) those which are concerned with equitable considerations.

Narrow construction has produced some very logical exceptions to the statute, such as the leading-object rule. Stated simply, it excepts from the guarantee provision those instances where the defendant has guaranteed another person's debts not as a gratuitous gesture but for a consideration.⁷⁵ The rationale, of course, is that it is more likely that a person will act as guarantor if he is adequately compensated. On the other hand, some of the narrow-construction doctrines appear to have little rational basis. For instance, the provision which requires a writing for all contracts not to be performed within one year has

⁷¹ This evidence does not support, nor is there any evidence in the record to support, the allegation in the complaint that a contract or agreement had been entered into between plaintiff and the deceased by the terms of which he had agreed to convey or will the property to her in consideration of services rendered or to be rendered by her for him.

Price v. Lloyd, 31 Utah 86, 94, 86 Pac. 767, 769 (1906).

⁷² The agreement was distinct and certain as to what plaintiff should receive. There was [sic] no vague, uncertain, undefined expectations of benefits to be derived, but a distinct positive promise — not to make plaintiff a gift, but in consideration of certain services, to bestow upon her her entire property.

Brinton v. Van Cott, 8 Utah 480, 486, 33 Pac. 218, 220 (1893).

⁷³ It is a fairly accurate rule of thumb that, in those cases in which the court indicates that the oral contract has been proven with clarity, it will be enforced. *E.g.*, *In re Madsen's Estate*, 123 Utah 327, 259 P.2d 595 (1953); *Allen v. Allen*, 50 Utah 104, 166 Pac. 1169 (1917). But when the court speaks of the contract as being vague, the statute will be a good defense. *E.g.*, *Campbell v. Nelson*, 102 Utah 78, 125 P.2d 413 (1942); *Hargreaves v. Burton*, 59 Utah 575, 206 Pac. 262 (1922).

⁷⁴ 2 CORBIN, CONTRACTS § 275, at 3-7 (1950).

⁷⁵ In Utah this rule has been enacted into law. UTAH CODE ANN. § 25-5-6 (1953).

been construed to apply only to those contracts which cannot possibly be performed within one year.⁷⁶ This may often produce desirable results, but the effects are sometimes bizzare. Hence, a contract to hire a young, healthy man for the remainder of his life would be enforceable, since it is possible that he could die within one year, thus fully performing the contract. A contract to hire, for thirteen months, a man with a disease known to be fatal within two months would be unenforceable, since full performance could not be completed within one year.

Those traditional doctrines which are based primarily on evidentiary considerations owe their origin to section 17 of the English act of 1677. That section could be satisfied without a "note or memorandum," if the purchaser accepted part of the goods sold or if he paid earnest money. Apparently, the drafters of that section considered these acts of the buyer to be sufficient evidence of the oral bargain to constitute a satisfactory substitute for a writing. There were no similar exceptions drafted into section 4, but the general principle has in some instances been carried over.⁷⁷ Thus, land contracts and contracts not to be performed within one year may not fall within the statute if they have been partially performed.

A few of the traditional doctrines are based primarily on equitable considerations, but this element is almost invariably interrelated with the evidentiary doctrine. For instance, there is an exception to the sale-of-goods section, where goods have been especially manufactured for the buyer. If these goods would not be readily salable to anyone else, the contract is taken out of the statute because of the great inequity of allowing the seller to go uncompensated for goods which have no market. This rule is also evidentiary, however, since this set of facts would be strong circumstantial evidence of a contract between buyer and seller. Evidentiary considerations are also often interrelated with the narrow-construction doctrines. For instance, the concept that the statute does not apply to oral contracts which are fully executed is not only a narrowing of the entire Statute of Frauds, but is also based on the fact that there could hardly be better evidence of any oral contract than having both sides completely performed.

It is evident that clear proof of the contract is an important element of the traditional doctrines, and that it is sometimes the sole consideration. Outside these doctrines, however, it is of little value. Even the tacit doctrines cannot be applied unless there is some other basis upon which the court can make its decision. The situation is analogous to the ancient writ system, for, if plaintiff cannot fit his circumstances into one of the traditional pigeon holes, he loses his case.

3. *The universal doctrines.* The principles which are referred to here as the "universal doctrines" need little in the way of introduction. They are concepts which are applicable to many phases of the law, but which are often

⁷⁶ *E.g.*, *Zion's Serv. Corp. v. Danielson*, 12 Utah 2d 369, 366 P.2d 982 (1961); *Christensen v. Christensen*, 9 Utah 2d 102, 339 P.2d 101 (1959).

⁷⁷ Morehand, *Statute of Frauds and Part Performance*, 78 U. PA. L. REV. 51, 61-67 (1929).

used by the court to ameliorate harsh effects of the Statute of Frauds where there is no other recourse.

(a) *Fraud and equitable estoppel*. It is uncontroverted that the court will preclude, where possible, the use of the statute for the perpetration of fraud, but there remains some question as to what is necessary to constitute fraud in this sense. The first Utah case concerning the matter was *Chadwick v. Arnold*,⁷⁸ wherein defendant purchased the mortgage on plaintiff's property and obtained an oral agreement whereby, if plaintiff would allow him to foreclose uncontested, he would purchase the land himself at the execution sale and reconvey it to plaintiff at a stipulated price. Plaintiff complied with her part of the agreement but, when the statutory period for redemption had expired, defendant refused to make the conveyance. The court held that the evidence dictated a finding that defendant had made the representations with the specific intent to defraud plaintiff, and it ordered specific performance of the contract. However, in the later case of *Papanikolas v. Sampson*,⁷⁹ on similar facts, the court found the specific intent to defraud lacking and allowed defendant to assert the statute. The court indicated that the representation alleged was nothing more than a promise to do something in the future and, thus, did not take the case out of the statute. The test set out in both cases was the same and appears to be synonymous with that of the common law action of deceit.⁸⁰

According to *Chadwick*, a person who promises not to assert the statute or to make a memorandum, and who does so with the specific intent to defraud, is precluded from asserting the statute as a defense. However, proof of the subjective state of an individual's mind is exceedingly difficult, as was shown in *Papanikolas*, and places a great burden on the plaintiff. The extent of this difficulty is exemplified by the fact that, since the 1908 *Chadwick* decision, the fraud argument has never been made successfully.⁸¹ On the other hand, little more than a mere promise may form the basis for an equitable estoppel, if plaintiff has relied to his detriment and there is no other means of avoiding great injustice.⁸² In some jurisdictions, such as California, the development of this doctrine has been carried so far that one writer has been led to comment that, in a certain area of commercial transactions, the statute has suffered nearly a virtual abrogation.⁸³ Whatever its stage of development in other states, however, the application of this doctrine to the Utah Statute of Frauds appears

⁷⁸ 34 Utah 48, 95 Pac. 527 (1908).

⁷⁹ 73 Utah 404, 274 Pac. 856 (1929).

⁸⁰ "[T]here must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise . . ." *Chadwick v. Arnold*, 34 Utah 48, 56, 95 Pac. 527, 530 (1908), citing 3 POMEROY, EQUITY JURISPRUDENCE § 1056 (3d ed. 1905).

⁸¹ *Easton v. Wycoff*, 4 Utah 2d 386, 295 P.2d 332 (1956); *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953); *Papanikolas v. Sampson*, 73 Utah 404, 274 Pac. 856 (1929).

⁸² See generally Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

⁸³ Note, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590, 605-06 (1965).

to be unsettled.⁸⁴ In *Ravarino v. Price*⁸⁵ the court discussed it at length and some of the dicta in that case might be interpreted as indicating that the court favors a liberal view such as that taken by California.⁸⁶ However, in actual practice it has not been carried so far. In *Ravarino*, for instance, the court refused to apply it because there was insufficient evidence to show that defendant's promise to sign a written contract was "deliberately made for the purpose of influencing the conduct of the other party."⁸⁷ It is unclear, as yet, whether this means that defendant's subjective state of mind must be shown or whether it is sufficient that the promise was made and that plaintiff changed his position in reasonable reliance upon it. The latter test would seem to be the better rule,⁸⁸ and the facts of the case indicate that a showing of reasonable reliance would probably be sufficient.

The exact nature and extent of the detriment which plaintiff must suffer before he can invoke equitable estoppel is a question which probably remains unanswered in many jurisdictions. In cases in which the court takes a liberal view of what constitutes "substantial" injury, the doctrine is an important device for eliminating objectionable consequences of the statute. In a California case,⁸⁹ defendant was estopped from asserting the sale-of-goods section of the statute where he had refused to accept goods shipped to him pursuant to an oral contract. Plaintiff had incurred substantial expense in transporting the goods, and between the time the contract was made and the time of shipment the market price had sharply declined. The court held that plaintiff's expenses and loss of profit constituted the necessary substantial detriment. This case seems to stand for the proposition that the loss of a good bargain may be sufficient to invoke equitable estoppel; but it is not common for the doctrine to be extended this far.⁹⁰ *Ravarino* would seem to indicate that the Utah court will proceed with caution in developing equitable estoppel, but the fact that Utah often follows California decisions leaves hope that it will become an important medium for eliminating injustices of the statute.

⁸⁴ Many Utah cases have considered the doctrine of estoppel but nearly all of them have dealt with the doctrine of part performance in land contracts. *E.g.*, *Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co.*, 103 Utah 249, 134 P.2d 1094 (1943); *Latses v. Nick Floor, Inc.*, 99 Utah 214, 104 P.2d 619 (1940). A recent student note has made a very careful appraisal of the Utah part performance-equitable estoppel cases. Note, 9 UTAH L. REV. 91 (1964).

⁸⁵ 123 Utah 559, 260 P.2d 570 (1953).

⁸⁶ The court spoke with favor of the liberal position espoused in RESTATEMENT, CONTRACTS § 90 (1932):

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.

123 Utah 559, 568, 260 P.2d 570, 575 (1953).

⁸⁷ 123 Utah 559, 570, 260 P.2d 570, 576 (1953), citing *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909).

⁸⁸ See Krauskopf, *Solving Statute of Frauds Problems*, 20 OHIO ST. L.J. 237, 239-50 (1959).

⁸⁹ *Goldstein v. McNeil*, 122 Cal. App. 2d 608, 265 P.2d 113 (Dist. Ct. App. 1954).

⁹⁰ See *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 131 Pac. 1062 (Dist. Ct. App. 1913).

(b) *Oral modification of written contracts.* The mere existence of a writing is far from absolute insurance that the Statute of Frauds will not be a bar to a contract's enforceability. The formal requirements of the judicially defined "sufficient memorandum" ⁹¹ have thwarted the plans of many more than one unsuspecting individual who thought his "contract" to be within the limits of the law. In fact, Utah's first Statute of Frauds case, ⁹² in 1873, denied recovery from a defendant who had guaranteed a note on the back of which had been written, "For value received I hereby guarantee the payment of the within note." ⁹³ A person with only a layman's knowledge of the statute might well think that such a writing is satisfactory. Even where there is a sufficient memorandum, Statute of Frauds problems are not far away, for the writing may not be a true representation of the agreement, or the parties may change their minds and attempt an oral modification. Fortunately, the often-stated rule that "express terms may not be changed or nullified by parol testimony" ⁹⁴ is a generality to which there are several saving exceptions. Under the proper circumstances, modification, reformation, and rescission by parol have been allowed by the Utah court. There is very little depth in Utah authority on these doctrines and they will not be discussed in detail here, but it was felt that because of their importance as mitigating factors, they should be mentioned.

The rules for oral modification were first stated by the court in 1925 in *Hogan v. Swayze*, ⁹⁵ where plaintiff had entered a written agreement for the purchase of land by which he was to receive an undivided one-half interest in the property concerned. In an action for specific performance he alleged that the written agreement had been altered by parol on the very next day after its execution, and that by the terms of this subsequent agreement he was to be conveyed the eastern one-half of the property. The court found: (1) that there had been an oral modification as alleged; (2) that there had been consideration therefor; and (3) that plaintiff's reliance on the contract had caused him to do such acts as constituted part performance. Specific performance of the contract as modified was granted. In view of the doctrines already discussed, this exception to the statute is far from surprising. Its ele-

⁹¹ Utah appears to accept the definition of "memorandum" which has been adopted by the American Law Institute. *Hawaiian Equip. Co. v. Eimco Corp.*, 115 Utah 590, 597, 207 P.2d 794, 797-98 (1949).

A memorandum, in order to make enforceable a contract within the Statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty,

- (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and
- (b) the land, goods or other subject-matter to which the contract relates, and
- (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.

RESTATEMENT, CONTRACTS § 207 (1932).

⁹² *First Nat'l Bank v. Kinner*, 1 Utah 100 (1873).

⁹³ *Id.* at 102.

⁹⁴ *Erickson v. Bastian*, 98 Utah 587, 592, 102 P.2d 310, 313 (1940).

⁹⁵ 65 Utah 380, 237 Pac. 1097 (1925).

ments consist of nothing more than the requirements for a written modification, plus the means by which any oral contract would satisfy, or be taken out of, the statute.⁹⁶

Another method for changing the terms of a written contract is the doctrine of reformation. In the majority of jurisdictions, including Utah, the rule is that, when there has been either fraud, accident, or mistake of fact in the drafting of a contract, the statute does not apply, since the reformation does not constitute a change in the contract but merely a reinstatement of the terms originally agreed upon.⁹⁷ Essentially, the only requirement is that the true terms of the contract be proved by "clear and convincing evidence."⁹⁸

The final exception to the general rule is oral rescission. Utah has but one case from which to draw, *Cutwright v. Union Sav. & Inv. Co.*,⁹⁹ but presented therein is a fairly comprehensive delineation of the Utah position which appears to conform to the rule espoused by the more liberal jurisdictions.¹⁰⁰ The first requirement is that the rescission be executed. This is merely an application of the long-recognized rule that the statute does not apply to an oral contract once it has been fully performed.¹⁰¹ Second, in making the rescission, no interest must be transferred which the statute would prohibit. That is, if title to land or to goods of a value over 500 dollars has already passed to the purchaser, an oral rescission is not enforceable because its effect would be to transfer the interest back to the seller — an act prohibited by the statute.

(c) *Restitution.* When plaintiff has failed to get damages or specific performance on his oral contract through one of the doctrines previously discussed, his last resort is restitution. This is an equitable device which is employed in all situations to "make whole" a party who has conferred a benefit but has received nothing in return. It is particularly adaptable to the Statute of Frauds cases. Although in most instances it may be the last alternative, occasionally it may produce results equal to any of the other doctrines. In fact, there are cases in which recovery has been as great in restitution as might have been obtained had action on the contract been allowed.¹⁰²

⁹⁶ A thorough discussion of oral modification of written contracts appears in *Bamberger Co. v. Certified Prods.*, 88 Utah 194, 48 P.2d 489, *aff'd on rehearing*, 88 Utah 213, 53 P.2d 1153 (1935). See generally Note, 11 So. CAL. L. REV. 228 (1959).

⁹⁷ Annot., 86 A.L.R. 448 (1933). Some courts make a distinction between a reformation which enlarges interest and a reformation which restricts it. It is said that in the latter instance the statute is not a bar because no interest beyond that in the existing memorandum is created; in the former instance the statute is a bar because such a reformation would create an interest for which there is no memorandum. The better rule, and that which is espoused in Utah, is that no distinction should be made. Reformation should lie in either instance. *Sine v. Harper*, 118 Utah 415, 222 P.2d 571 (1950).

⁹⁸ *Id.* at 432, 222 P.2d at 580.

⁹⁹ 33 Utah 486, 94 Pac. 984 (1908).

¹⁰⁰ See 2 CORBIN, CONTRACTS § 302 (1950); RESTATEMENT, CONTRACTS § 222 (1932).

¹⁰¹ See *Greenwood v. Jackson*, 102 Utah 161, 128 P.2d 282 (1942); *Kerr v. Hillyard*, 51 Utah 364, 170 Pac. 981 (1918); *Johnson v. Johnson*, 31 Utah 408, 88 Pac. 230 (1906); *Walker v. Bamberger*, 17 Utah 239, 54 Pac. 108 (1898).

¹⁰² *Spinney v. Hill*, 81 Minn. 316, 84 N.W. 116 (1900); *Bennett Leasing Co. v. Ellison*, 15 Utah 2d 72, 387 P.2d 246 (1963).

Oddly enough, it appears that the first time restitution was used in a Statute of Frauds case in Utah, it converted the statute from the "shield" it was intended to be into a "sword."¹⁰³ It allowed plaintiff to avoid the obligations of a contract, which he apparently considered to be unfavorable, and yet still recover money which he had already paid to defendant. Plaintiff had made a contract to purchase land and had already paid 1,200 dollars of the agreed 1,600 dollars consideration when he discovered that his seller, John McChrystal, did not have legal title. Instead, title was in Noah McChrystal¹⁰⁴ who had drawn up a warranty deed in favor of plaintiff, but had tendered it after suit had already been brought for return of the purchase money paid. The court recognized the rule that the defaulting party cannot seek restitution if the other party stands ready to perform,¹⁰⁵ but stated that it did not apply because tender of performance was not made by the other party to the contract. Presumably, another result would have been obtained if title had been transferred from Noah to John, and if tender had been more promptly made.

More representative of the court's treatment of restitution is *Fabian v. Wasatch Orchard Co.*,¹⁰⁶ in which plaintiff was allowed to recover in *quantum meruit* for services rendered in developing a sales market for defendant's product. It was contended that no action should lie because defendant had actually lost money on sales promoted by plaintiff rather than having received any benefit therefrom; but the court stated that this was a mere argument of semantics. It was evident that, although defendant was forced to sell at a price lower than cost, this was not attributable to any fault on the part of plaintiff and defendant's loss might well have been greater without plaintiff's services. The rule is not that defendant must realize a profit but that some benefit must accrue to him.

There is one section of the Utah Statute of Frauds under which restitution has no application. Section 25-5-4(5) states that "every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" must be in writing to be enforceable. This provision was not part of the English act of 1677 and its origin is unknown. Its apparent promise, however, is either that real estate agents are inherently more unscrupulous than other kinds of agents, or that it is inherently easier to perpetrate a fraud in connection with a real estate contract. Whatever its origin or purpose, its effect is to preclude a recovery in restitution by a real estate agent who has been foolish enough to disregard it. It is said that, if the agent were able to recover the value of his services in *quantum meruit* after having performed his part of the contract, the section would in effect be nullified.¹⁰⁷ An oral real estate contract is thus expressly made unenforceable by the statute and it cannot be reinstated by allowing recovery on an implied contract.

¹⁰³ *Bacon v. McChrystal*, 10 Utah 290, 37 Pac. 563 (1894).

¹⁰⁴ The opinion does not specify the exact relationship between John and Noah McChrystal. It seems likely, however, that they were either brothers or father and son.

¹⁰⁵ *Bacon v. McChrystal*, 10 Utah 290, 293, 37 Pac. 563, 564 (1894).

¹⁰⁶ 41 Utah 404, 125 Pac. 860 (1912).

¹⁰⁷ See *Baugh v. Darley*, 112 Utah 1, 10, 184 P.2d 335, 339 (1947), citing RESTATEMENT, CONTRACTS § 355(3) (1932).

The most interesting and probably the most important question concerning restitution as it is applied to the Statute of Frauds is what the basis should be for determining the amount necessary to return plaintiff to his original position. If the action is for money paid and received, the answer is obviously not difficult; and similarly, if there has been a transfer of land or goods, specific restitution may make the proposition a relatively simple one. But specific restitution may not be appropriate in the above cases, or the benefit conferred may have been services or something else of indeterminate value.

It is well settled that value is not cost to the plaintiff, nor is it the defendant's actual increase in financial status.¹⁰⁸ Value is the pure worth of the benefit conferred, but how it should be calculated is a subject of some dispute.¹⁰⁹ Many courts hold that market value, an unknown in itself, is the proper measure,¹¹⁰ yet there are cases which indicate that cost to the plaintiff¹¹¹ or the oral agreement itself¹¹² is controlling. Utah takes a middle position and makes market value the measure, but allows the fact finder to consider evidence of plaintiff's detriment and the terms of the oral contract in arriving at market value. In essence, this rule allows the jury to determine whether or not plaintiff is to recover on the contract. This is aptly illustrated in *Bennett Leasing Co. v. Ellison*,¹¹³ in which plaintiff brought an action in *quantum meruit* for the reasonable rental value of an automobile he had leased to defendant. There was a written contract by which defendant was to be charged \$79.49 per month, but it was not a valid memorandum for it lacked defendant's signature. The contract was submitted to the jury as evidence of market value and they returned a verdict of \$1,144.52 — precisely the contract rental value of \$79.49 per month multiplied by the number of months defendant had retained the car without making payments. With Chief Justice Henriod and Justice Callister dissenting, the court affirmed the lower court's decision and held that the unsigned contract was properly taken into account.

It is only reasonable that in many instances a recovery in restitution will closely approximate the oral contract price, for presumably, that figure will be representative of market value. *Bennett* brings this fact into rather vivid focus and emphasizes how nearly this remedy, together with jury sympathy, may come to abrogating certain applications of the statute.

¹⁰⁸ See *Bennett Leasing Co. v. Ellison*, 15 Utah 2d 72, 387 P.2d 246 (1963); 2 CORBIN, CONTRACTS § 327 (1950).

¹⁰⁹ See Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. REV. 1 (1950).

¹¹⁰ *E.g.*, *Gray v. Cheatham*, 52 S.W.2d 762 (Tex. Civ. App. 1932); *Bennett Leasing Co. v. Ellison*, 15 Utah 2d 72, 387 P.2d 246 (1963). Courts often speak in terms of "reasonable value" which appears to be the same concept. *E.g.*, *Blank v. Rodgers*, 82 Cal. App. 35, 255 Pac. 235 (Dist. Ct. App. 1927); *Jelleff v. Hummel*, 56 N.D. 512, 218 N.W. 227 (1928).

¹¹¹ *Huey v. Frank*, 182 Ill. App. 431 (1913); *Chapman v. Rich*, 63 Me. 588 (1874).

¹¹² *Murphy v. De Haan*, 116 Iowa 61, 89 N.W. 100 (1902); *Spinney v. Hill*, 81 Minn. 316, 84 N.W. 116 (1900).

¹¹³ 15 Utah 2d 72, 387 P.2d 246 (1963).

III. THE PRESENT STATUS AND FUNCTION OF THE STATUTE

The history of the Utah Statute of Frauds seems to indicate that the statute has never really been given serious legislative consideration. However, Utah probably does not stand alone in this respect, and the widespread acceptance of the statute as an integral part of Anglo-American law might be a tolerable excuse for legislative apathy. The fact that in 1954 the English repealed all but two provisions of the Statute of Frauds¹¹⁴ shows that criticism of the statute need not be entirely academic. Nevertheless, as things now stand in the United States, it appears that the court, rather than the legislature, is the statute's primary source of innovation.

The Utah court has performed no act of judicial abrogation, nor is it likely that the statute will ever be completely emasculated in this manner. But the court has long recognized that there is no utility in invoking the statute when doing so would serve no reasonable purpose. Whenever possible, the court tacitly circumvents the statute or applies the traditional exceptions. If plaintiff cannot fit his case into one of the traditional molds, he may still find success in enforcing his contract through the doctrine of equitable estoppel, and, should this fail, he can seek restitution which will, at the very least, return him to the status quo. Taken from this perspective, it is evident that only a few situations potentially within the statute will result in an out-of-pocket loss to one of the parties because of unenforceability. Generally, the only loss is that of a good bargain — the expectancy right of a wholly executory contract. And yet, although there may be no great injustice in such a rule, this is not to say that it is either necessary or wise.

The theoretical validity of the statute is probably best discussed in terms of its purpose. As previously stated, there is little agreement on what the purpose is, but there seems to be a substantial degree of support for each of the following: (1) to prevent fraud and perjury; (2) to promote certainty in contracting; and (3) to prevent legal obligations from being unnecessarily thrust upon persons without their thorough consideration of the consequences.

Undoubtedly the statute is effective to at least some degree in carrying out each of these purposes, but whether or not this effectiveness is substantial enough to warrant tolerating the difficulties spawned by the statute is open to question.

Probably the theory which has suffered most at the hands of critics is that which is incorporated into the preamble of the act of 1677 — "The Prevention of Frauds and Perjuries." By most commentators this has been deemed an evidentiary consideration which lost its validity as modern procedure and rules of evidence were developed.¹¹⁵ It has been often said that the statute may work against the innocent as well as the guilty, thus promoting at least as much

¹¹⁴ Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34. This was effective June 4, 1954. The statutes repealed were § 4 of the Statute of Frauds, 1677, 29 Car. 2, c. 3, and § 4 of the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71. See generally 68 HARV. L. REV. 383 (1954).

¹¹⁵ E.g., Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916); Drachsler, *The British Statute of Frauds — British Reform and American Experience*, 3 International & Comparative L. Bull., Dec. 1958, p. 24.

fraud as it prevents.¹¹⁶ The English Review Commission, whose findings directly resulted in the 1954 abrogation of all but the interests in land and guarantee provisions of the English act, apparently viewed the purpose of the statute as evidentiary. As such, according to the commission, the statute had long since lost its usefulness.¹¹⁷ However, there are modern writers of eminence who see value in the statute for other reasons. The late Professor Karl Llewellyn is often quoted as saying:

After two centuries and a half the statute stands, in essence better adapted to our needs than when it was first passed. . . . [T]he net effect of the two rules together [the statute and the parol evidence rule], as they work into lay practice, and viewed simply in their effects outside of litigation, is almost certainly wholesome; both encouraging permanent trustworthy record of agreements, and in inducing care in the making of that record.¹¹⁸

It should be noted from the outset that Professor Llewellyn qualifies his commendation of the statute by considering it divorced from its generally acknowledged harmful effects in litigation. His statement was apparently not meant to take into account the injustices often perpetrated by the statute. Even considered apart from its harmful effects, however, there may still be some question as to the statute's value. One wonders how effective it really is in encouraging certainty in contracting.

A statistical survey made by students at the Yale School of Law and published in 1957 indicates that, by and large, the practices of businessmen conform to the requirements of the statute.¹¹⁹ The survey also seemed to show, however, that this compliance bears little, if any, relationship to the Statute of Frauds.¹²⁰ With regard to reducing agreements to writing, it points out that businessmen are concerned primarily with practical business considerations, such as the extent of previous transactions with the customer, his financial status, and the exigencies of time.¹²¹ Moreover, it indicates that whether contracts are oral or written and, irrespective of the legal effect of the statute, the practice is not to sue on broken contracts except under exceptional circumstances.¹²² On the basis of this survey, the unavoidable conclusion is that, whether or not businessmen are aware of the statute, their actions are directed not so much by the statute as by sound business practices.

Unfortunately the Yale study did not include data concerning the effect of the statute on the man on the street. To obtain some tangible data on this subject, fifty-eight persons selected from the Salt Lake City area were ques-

¹¹⁶ 2 CORBIN, CONTRACTS § 275, at 8 (1950).

¹¹⁷ English Law Review Commission, *Report*, CMD. No. 5449 (1937) (reprinted in 15 CAN. B. REV. 585, 589 (1937)).

¹¹⁸ Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 747-48 (1931).

¹¹⁹ Note, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1050-51 (1957).

¹²⁰ *Ibid.*

¹²¹ *Id.* at 1064.

¹²² *Id.* at 1061-62, 1065.

tioned concerning their knowledge of contracts required to be in writing.¹²³ This survey was not intended to be statistically representative, but merely to present general attitudes. It can be summed up as follows: People are generally aware of the need for a writing and, in fact, many believe all contracts must be in writing in order to be enforceable.¹²⁴ Actual knowledge of the statute is extremely vague,¹²⁵ and for the most part has been gained through experience and word-of-mouth.¹²⁶ About two-fifths of the people questioned were aware that real estate transactions require a writing,¹²⁷ and a few people were aware of the sale of goods section. However, only a single individual knew of the 500 dollars dividing line,¹²⁸ and very few were aware of other provisions of the statute.¹²⁹

¹²³ The survey was conducted orally so that questions could not be answered with reference to one another. The questions posed which are germane to this discussion are as follows:

1. Must all contracts be in writing in order to be binding on the parties?
2. If your answer to question 1 is no, then list all of the types of contracts, according to your knowledge of Utah law, which must be in writing in order to bind the parties.
3. From what source have you gained your knowledge concerning what contracts must be in writing?

Seventeen of the subjects of the survey were professional people, most of whom had doctorates in medicine, dentistry, or education. Thirteen subjects were businessmen who either owned or managed small enterprises such as grocery stores, insurance agencies, clothing stores, or banks. Twenty-eight subjects were "average" individuals, most of whom had no particular educational or business qualifications.

¹²⁴ Of the 58 persons questioned, 15 believed that all contracts must be in writing in order to be enforceable, 2 stated that they did not know, and the rest indicated that some oral contracts were enforceable.

¹²⁵ Thirty of the 58 subjects either believed that all contracts must be in writing in order to be enforceable or had no idea which contracts require a writing. Of the 28 persons who attempted to state the types of contracts which are subject to the Statute of Frauds, none could name every provision and 10 gave wholly incorrect answers. Some of the remaining subjects answered correctly as far as they went, but most made such statements as "expensive chattels," or "automobiles" — not wholly incorrect answers but evidence of only a vague knowledge of the statute.

Common errors and partial errors were "installment contracts," "insurance contracts," "automobile contracts," "employment contracts," and "loans." These answers seem to indicate that many people associate the necessity for a memorandum with agreements (such as insurance contracts) which are normally put in writing whether or not a writing is actually required for enforceability.

¹²⁶ Many people indicated that their knowledge came from several sources. "General experience" was named 28 times, 18 people said that they "just heard it from somewhere," and 17 persons credited their knowledge to formal education.

¹²⁷ Twenty-five of the 58 subjects indicated that contracts for the sale of "property," "homes and furniture," and "real estate" had to be in writing. One person said that a memorandum was required for any sale that must be recorded. However, he included automobile sales in this category.

¹²⁸ Of the 11 subjects who evidenced an awareness of the sale-of-goods section, most gave answers such as "conditional sales contracts" or "sale of expensive chattels." Two persons indicated that they knew that sales contracts were within the statute only if the value of the goods sold exceeded a certain amount. One man said "over \$250, I think," and the other correctly stated "\$500."

¹²⁹ The provisions other than those dealing with the sale of real property and goods valued over \$500 were seldom mentioned. One person said that "marriage contracts" must be in writing and another person was aware of the "contracts not to be performed within one year" provision. No other sections were mentioned except by a young assistant vice president in a bank, who named each provision in rapid succession, omitting only one — contracts in consideration of marriage. He stated that this information had been obtained in a course on sales transactions but readily admitted that he had never had the opportunity to put it to use.

Thus, it appears that the statute might "*act in terrorem*," as Professor Corbin has stated,¹³⁰ at least insofar as the average individual is concerned; but people seem to have little actual knowledge and many misconceptions concerning it. Moreover, it is possible that the average person's impression that certain contracts must be in writing is not attributable to the existence of the statute but to a general reverence toward the written word. The fact that the requirement of a writing is so well established as a business practice may be another possible source of this attitude. Furthermore, the common misconception that all contracts must be in writing suggests another ill effect of the statute. This was brought to the writer's attention by the responses of several of the subjects of the survey. A person who believes that all contracts must be in writing may not assert his legal rights on a just debt merely because he thinks it is unenforceable.

The third theory, that contracts which are reduced to writing are more apt to be entered into with deliberation, is reminiscent of the common law devices of livery of seisin and the seal. These doctrines also recognized the desirability of not holding a person liable on agreements entered into lightly. An analogous requirement in contracting is the doctrine of consideration which evidences a conservatism with regard to enforcement of one-sided bargains. It has been cogently argued that the Statute of Frauds from its inception was primarily intended as this kind of safeguard,¹³¹ but the seal and livery of seisin are dead, and even consideration appears to be in an advanced stage of obsolescence. It is reasonable to assume that their demise is due to the lack of need.

Even if it were conceded that under certain circumstances the enforceability of contracts should depend on the existence of a memorandum, at least half the argument for retaining the Statute of Frauds as the last remnant of formalism is lost because of the way it is drafted. In relation to the structure of modern society, the provisions of the statute are arbitrary at best. One can hardly conceive of a good reason why a complicated insurance policy, having a coverage of 20,000 dollars, could theoretically be oral yet enforceable, but not a simple contract for the sale of a 500-dollar television set. If the law should distinguish between written and oral contracts in lending its sanctions for enforcement, surely the lines could be drawn more distinctly and more rationally.

IV. CONCLUSION

The Statute of Frauds remains not only a legal anachronism, but also a great legal paradox. The original statute has, for the most part, been abrogated in England, but its progeny in the United States live on amidst criticism which almost unanimously calls for repeal or reformation. The statute is antiseptically preserved by strong judicial and legislative inertia, but it is often unknown, ignored, or misunderstood by the persons whom it was designed to affect. A

¹³⁰ 2 CORBIN, *CONTRACTS* § 275, at 13 (1950).

¹³¹ Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. Rev., April 1947, p. 174.

law which exists for no other than historical reasons must surely be ultimately defeated at the hands of logic and experience.¹³² But for the present, at least, it seems that we would "rather bear those ills we have than fly to others that we know not of."¹³³

Jerry W. Monroe

¹³² It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

¹³³ Shakespeare, *Hamlet*, act 3, scene 1, lines 81 & 82.

CASES NOTED

Appropriation of Name, Likeness, and Personality — Relatives and Administratrix Held To Have No Claim Under Privacy or Property Theories

The widow, son, and administratrix of Al Capone brought a federal diversity action against the producer, broadcaster, and sponsor of the television program "The Untouchables." This program series, in which Al Capone's name was used in connection with over one hundred fictitious crimes of violence, continued over a five-year period. The widow and son claimed invasion of privacy, and the administratrix claimed unjust enrichment in the commercial appropriation of the name, likeness, and personality of Capone. Upon dismissal of the complaint, plaintiffs appealed to the Seventh Circuit Court of Appeals, which *held*, affirmed. The privacy of a person is not invaded by an appropriation of the name, likeness, or personality of a relative. The estate has no property right in the name, likeness, or personality of a deceased. *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 86 Sup. Ct. 176 (1965).

One form of invasion of privacy is the appropriation of a name, likeness, or personality for commercial purposes.¹ However, the proposition that a relative has a right to be free from injuries caused by such an appropriation has been rejected by most courts which have ruled on it.² Although a remedy has been granted for the use of the *property* interest in a name, likeness, or personality of a living person,³ recovery has not yet been allowed for an administrator's claim for the use of the property in the name, likeness, or personality of a deceased.

¹ PROSSER, TORTS § 112, at 839-42 (3d ed. 1964). The other recognized forms of invasion of privacy are: physically intruding upon plaintiff's solitude or seclusion, publicly disclosing private facts, and placing one in a false light in the public eye. The invasions to be actionable must be offensive to a reasonable man. *Id.* at 833-39.

² The following cases held that a family member's privacy was not invaded. *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799 (Dist. Ct. App. 1959) (false film concerning husband); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (Dist. Ct. App. 1958) (false publications concerning brother); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (published story of murder of child).

It is a crime in three states to use, for purposes of advertising or trade, the name, portrait, or picture of a person living or deceased. OKLA. STAT. ANN. tit. 21, § 839 (1958); UTAH CODE ANN. § 76-4-8 (1953); VA. CODE ANN. § 8-650 (1950).

The Virginia statute also allows the person harmed to sue to enjoin the use of his name, portrait, or picture. If the person is dead, his surviving consort or next of kin may bring the suit.

The Utah statute was construed in *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954) (dictum), as granting a civil right of action to the heirs of a deceased whose name or picture had been used for purposes of advertising or trade whether the deceased had been a resident of Utah or not.

In New York it is a misdemeanor to use, for purposes of advertising or trade, the name, portrait, or picture of a living person. The person whose name is so used also has an action for injunction and damages. N.Y. CIV. RIGHTS LAW §§ 50-51. There is no criminal or civil action in New York for the use of the name, portrait, or picture of a deceased person.

³ *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951); *LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

In the instant case, the court, in affirming the dismissal of plaintiff's complaint, said that since Capone is dead it is obvious that his privacy could not be invaded and indicated that the publications did not invade the privacy of the widow or son in any respect because they were not shown or referred to in any of the telecasts.⁴ The court classified the administratrix's property claim for the use of Capone's name, likeness, and personality as part of the invasion of privacy action and rejected it.⁵

In assessing the claimed invasion of privacy, the court applied Illinois law under the doctrine of *Erie R.R. v. Tompkins*.⁶ The court decided that the Illinois case of *Bradley v. Cowles Magazines, Inc.*,⁷ where a mother was denied recovery in a privacy action when articles were published giving an account of the murder of her child, precluded the federal courts from recognizing the right of a party to be free from injuries caused by publications concerning a relative.⁸ Even though *Bradley* is factually distinguishable from the instant case,⁹ the *Bradley* court sufficiently expressed its unwillingness to extend privacy protection to members of a family injured by publications concerning a relative to bind federal courts to the same position.¹⁰

In two cases from other jurisdictions, parents of deceased, malformed children were allowed an action for what appeared to be an invasion of the parents' privacy when pictures of the children were published without the parents' consent.¹¹ However, this right of family members to enjoy peace of mind and freedom from pecuniary loss caused by unprivileged publications concerning a

⁴ Instant case at 419-20.

⁵ *Id.* at 420. The district court cited PROSSER, TORTS § 97 (2d ed. 1955), and Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), in support of their position that the appropriation of some element of a personality for commercial purposes falls within right-of-privacy confines. *Maritote v. Desilu Prods., Inc.*, 230 F. Supp. 721, 723-24 (N.D. Ill. 1964).

⁶ 304 U.S. 64 (1938). Since *Erie*, the federal courts have ruled that decisions of intermediate state courts would be binding on federal courts in diversity cases in the absence of "convincing evidence," *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940), or "persuasive data," *Shelp v. National Sur. Corp.*, 333 F.2d 431, 439 (5th Cir.), *cert. denied*, 379 U.S. 945 (1964), that the highest state appellate court would decide differently.

⁷ 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960).

⁸ As a practical matter, most claims that privacy has been invaded by an appropriation or other publication of the name of a relative will occur when the publication concerns a deceased relative. It seems that, when a living person whose name has been appropriated brings an action himself, his living relatives, who may well have been injured, feel somewhat compensated by the action. *But see Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876 (1952).

⁹ In *Bradley* the articles were true, but in the instant case the programs were fictional.

¹⁰ In the absence of direct holdings by state courts, considered dictum will be sufficient to bind federal courts. 1A MOORE, FEDERAL PRACTICE ¶ 0.307[2], at 3312 (2d ed. 1959).

¹¹ *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912).

"[T]he opinion in the case of *Douglas v. Stokes* . . . could have been put on no ground other than the unwarranted invasion of the right of privacy." *Brents v. Morgan*, 221 Ky. 765, 773, 299 S.W. 967, 971 (1927) (dictum).

In *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 210, 50 S.E. 68, 76 (1905), the leading case in the United States recognizing the right of privacy, the court explained that its decision was not to be interpreted as barring relatives from recovering for injuries caused by the desecration of the memory of a deceased.

See Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934).

relative is not generally recognized.¹² There appear to be two barriers which have prevented the courts from recognizing, analyzing, and protecting this right. First, they have not clearly distinguished between newsworthy and non-newsworthy cases.¹³ Since the privilege to publish newsworthy items is well established,¹⁴ there has been no necessity for courts dealing with newsworthy-item cases to deny compensation for the publication on the ground that they are not willing to extend privacy protection. Second, it appears that, because the relatives' invasion-of-privacy claim usually occurs in connection with the use of the name of a deceased, the courts have confused it with a claim accruing to the deceased before his death which the relatives are trying to bring as his heirs. The courts, therefore, deny recovery because the action of privacy is personal.¹⁵ Even though there are persuasive arguments for allowing personal rights to outlive a deceased and be claimed by his heirs,¹⁶ this is not the question. The ques-

¹² Courts frequently misinterpret *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895), in asserting the proposition that a person has no right to be free from injuries caused by activities concerning a relative. In that case, admirers of a deceased began to erect a statue in her honor and her family sought an injunction. The injunction was denied, because the activity would not be considered improper by a reasonable man. The court conceded that the relatives would have had an action if the activity had been improper.

Some writers have urged that injuries caused the living by the use of the name, likeness, or personality of a deceased should be compensated. Green, *supra* note 11; Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 554-55 (1941). There appears to be no valid reason for limiting this recovery to situations wherein the person whose name is appropriated has deceased. All persons actually injured by the unreasonable use of a living person's name should be compensated when that use is not privileged.

¹³ E.g., *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960); *Kelley v. Post Publishing Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951). In these cases, while the courts seemed to be denying a privacy right to surviving members of a family when publications appeared concerning a deceased, in reality, the events publicized were newsworthy and, therefore, privileged.

¹⁴ The following cases denied any invasion of privacy to the complaining party because the events were newsworthy, of legitimate public concern, and, therefore, privileged: *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946) (broadcast concerning sedition charge against plaintiff); *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 251 (W.D. La. 1962) (article about murder of child); *Jenkins v. Dell Publishing Co.*, 143 F. Supp. 952 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958) (published picture of man kicked to death); *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235 (1955) (picture showing bullet protruding from head of dead son); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948) (broadcast story of plaintiffs' murdered father 25 years after event); *Smith v. NBC*, 138 Cal. App. 2d 807, 292 P.2d 600 (Dist. Ct. App. 1956) (broadcast concerning plaintiff who had falsely reported panther escape); *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956) (photo and story of son's mutilated body).

Matters of legitimate public interest concerning public figures are privileged. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940); *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (Dist. Ct. App. 1949). Educational and informational materials are also privileged. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D.N.Y. 1936); PROSSER, *Torts* § 112, at 846-47 (3d ed. 1964). There is no privilege, however, to publish fiction about an actual person. *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951).

¹⁵ E.g., *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799 (Dist. Ct. App. 1959); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (Dist. Ct. App. 1958).

¹⁶ "[N]o reason appears why personal rights should die with the person. A cause of action is an asset . . . It should not be lost upon death." Nizer, *supra* note 12, at 554. The distinction between personal and property rights is an old common law distinction and there is little else that can be said for it. There is no reason to allow a tort-feasor to escape payment for liability because of the fortuitous death of one whom he has wronged,

tion is whether members of a family suffer pecuniary loss or have their peace of mind interrupted by appropriations or publications of the name, likeness, or personality of a relative. Courts do not seem to be willing to analyze the possibility that a publication concerning an individual may be an invasion of his family's privacy even though they are not mentioned in the publication. The fear that the floodgates of litigation will be opened has prompted the courts to be more concerned with who is mentioned in a publication than with who is injured by it.¹⁷ This is not a persuasive argument for the denial of recovery for actual injury. Courts should carefully examine publications which are not newsworthy to determine if the alleged injuries are actual and should grant recovery if they are found to be so.

Though the *Erie* doctrine precluded the recognition of the relatives' claim, it did not bind the federal court to deny the administratrix's property claim for the use of Al Capone's name, likeness, and personality.¹⁸ Since the Illinois courts have not decided whether a name or likeness is property, the federal courts hearing diversity actions in that state should look to all available data and adopt the rule that they believe the highest state court would adopt on the basis of reason and fairness.¹⁹ The Illinois Constitution contains the doctrine that one ought to be able to find a remedy for all injuries and wrongs sustained by him.²⁰ There is authority in Illinois for the proposition that the common law should grow since its rigidity can often mean injustice and such injustice should not be allowed.²¹ Judges from both courts that have dealt with the instant case agree that an injustice has been done, and yet, neither court was willing to allow a recovery.²²

unless the recovery would clearly be a windfall to one who had no close relationship to the person who originally had the right-of-privacy action.

Defamation is another "personal" right. It appears that a defamatory utterance concerning a deceased does not legally injure the living. PROSSER, TORTS § 106, at 762 (3d ed. 1964). Relatives may not bring an action for maligning of a deceased unless it would "affect their reputation." *Eagles v. Liberty Weekly, Inc.*, 137 Misc. 575, 244 N.Y. Supp. 430, 431 (Sup. Ct. 1930). In *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335, 31 N.E.2d 182 (1940), it had been falsely published in defendant newspaper that deceased was a notorious criminal. Plaintiff wife and children of deceased were named, yet no cause of action was granted. It appears that, in the libelous publication, it would require an extremely direct reflection on the living for them to have a claim.

¹⁷ *E.g.*, *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (Dist. Ct. App. 1958); *Kelley v. Post Publishing Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951).

¹⁸ For a discussion of the notion of property interest in a name see Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. REV. 553 (1960).

¹⁹ *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

²⁰ "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay." ILL. CONST. art. 2, § 19.

²¹ "[C]ourts are called upon to grant redress in a case without precedent for injuries resulting from conduct which universal opinion . . . would . . . condemn as indecent and outrageous." *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 303, 106 N.E.2d 742, 747 (1952).

²² "The court however must agree with plaintiff that a wrong has been committed." *Maritote v. Desilu Prods., Inc.*, 230 F. Supp. 721, 726 (N.D. Ill. 1964).

"I think the right of privacy of Mae Capone and Sonny Capone was invaded by Desilu and other defendants whose conduct . . . is . . . in my mind, reprehensible." Instant case at 421 (concurring opinion).

Historically, where intangible interests of plaintiffs have been invaded, courts have searched to predicate recovery on some invasion of property rights.²³ With this history in mind, Warren and Brandeis, in their famous article, urged that a new right (privacy) be created that would protect people from more types of intrusions than had formerly been protected under property theories.²⁴ Although the courts have recognized this new right of privacy, they have continued to recognize a property right in intangibles — particularly in a name wherein some commercial use has been made of it.²⁵ It would appear reasonable that the property-in-a-name idea could have been used in the instant case to rectify an obvious injustice. There is no reason to allow commercial exploitation of a man's name without requiring the exploiters to pay for it. It is indeed strange that privacy, which was intended to be a more inclusive right than property in these types of cases,²⁶ should be used to narrow the scope of a plaintiff's protection. In the instant case, the court missed the opportunity to designate clearly the property rights in a name, likeness, or personality and to allow them to descend to the administrator of a deceased, as is allowed with most personal property rights.²⁷ The court also missed the opportunity to require the users of a clearly lucrative entity to pay for such use.

Another notable feature in the instant case is that Al Capone was a public figure. In recent cases the courts have been willing to recognize a property right in the name, likeness, or personality of a public figure.²⁸ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*²⁹ held that a ball player had a publicity

²³ *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912) (property right in content of private letters); *Prince Albert v. Strange*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849) (property right in artistic creation); *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (Ch. 1818) (property right in contents of letter); see 1 HARPER & JAMES, TORTS § 9.5 (1956).

Courts have also found contract right on which to predicate recovery in situations where plaintiff's privacy had been invaded. *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888) (contract prevented photographer from exhibition of extra pictures); *Abernathy v. Hutchinson*, 1 Ha. & Tw. 28, 47 Eng. Rep. 1313 (Ch. 1825) (implied contract prevented students from publishing teacher's lectures).

²⁴ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁵ *Uproar Co. v. NBC*, 81 F.2d 373 (1st Cir. 1936); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907); *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951).

Dean Prosser has admitted that the effect of the so-called privacy cases dealing with appropriation of name, likeness, and personality for commercial purposes is to "create something resembling a property right . . ." PROSSER, TORTS § 97, at 639 (2d ed. 1955).

Since commercials are liberally interspaced throughout television programs on the theory that the sales of the sponsors' products will increase shortly after the commercials are shown, material used in a sponsored program is used for a commercial purpose. It must be kept in mind, however, that newsworthy items are privileged to be broadcast whether they are sponsored or not. Cases cited note 14 *supra*.

²⁶ Warren & Brandeis, *supra* note 24.

²⁷ TIFFANY, REAL PROPERTY § 425 (1912).

²⁸ *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.) (dictum), *cert. denied*, 351 U.S. 926 (1956); *Sharman v. C. Schmidt & Sons*, 216 F. Supp. 401 (E.D. Pa. 1963) (dictum); Bloustein, *Privacy as an Aspect of Human Dignity*, 39 N.Y.U.L. REV. 962, 988-89 (1964).

²⁹ 202 F.2d 866 (2d Cir. 1953).

value, a property right, in his photograph or likeness.³⁰ In the instant case, the court rejected that notion insofar as it pertained to a deceased. If the instant case is followed, it will be impossible to prevent the appropriation and exploitation of the name of a famous person after his death. If neither the estate nor the heirs are to be allowed an action under facts similar to those in the instant case, commercial exploiters could hover, vulture-like, waiting for a public figure to die so that they could legally use his name, likeness, or personality in any way they pleased. It is arguable that a criminal should not enjoy a right to property in his name since this would allow him to profit by his notoriety. Nevertheless, a living criminal would have an action for invasion of privacy under facts similar to those in the instant case.³¹ Since the name of a living criminal is protected from exploitation under a privacy theory, the name of a dead criminal should be protected under either a property or a privacy theory. There appears to be no valid reason for allowing either a living or a dead person's name to become fair game for the entertainment world, and injuries caused by such an unauthorized use should be compensated.

It is submitted that in future cases careful consideration should be given to a right of members of a family to enjoy peace of mind and freedom from pecuniary loss caused by the unauthorized and unprivileged appropriation or publication of the name, likeness, or personality of a relative. A test is suggested wherein recovery for mental injuries,³² special damages, or both be

³⁰ For a discussion of the notion that public figures have a property right in their likeness see Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954). But see *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir.), cert. denied, 315 U.S. 823 (1942).

³¹ In *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951), an action was allowed plaintiffs when accounts of a murder they allegedly engaged in were embellished by fictionalization. The court said that, though they were public figures through their alleged criminal activities, fiction concerning them could not be published. This certainly seems a better rule than that of the instant case. *Garner* was based on the right of privacy rather than property, however, and decided nothing concerning dead public figures. It appears that the names of dead public figures are the ones in danger of exploitation.

³² Courts no longer hesitate to grant recoveries for intentional mental injuries. *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

"Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled judges to afford the requisite protection . . ." Warren & Brandeis, *supra* note 24, at 195.

The plaintiffs might have recovered in the instant case for the tort of the intentional infliction of severe emotional distress. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . ." RESTATEMENT (SECOND), TORTS § 46(1) (1965). Decedent's son, a boyhood friend of Desi Arnaz, pleaded with him not to proceed with "The Untouchables." Arnaz, president of Desilu, probably knew that the production would embarrass and humiliate the Capones. Instant case at 421. This conduct may be sufficient to constitute the intent required for the tort. Intent can be found from knowledge to a substantial certainty that certain results will obtain from an act. RESTATEMENT (SECOND), TORTS § 8A, comment b (1965). The question is whether the conduct would be outrageous enough to allow recovery. *Id.* § 46, comment d. The courts now recognize the intentional infliction of severe emotional distress as a separate tort. See, e.g., *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). There is Illinois authority for the recognition of the tort. *Knierim v. Izzo*, *supra*. In that case a threat to murder plaintiff's husband was enough to state a cause of action for intentional infliction of severe emo-

allowed only when the unprivileged and unauthorized use is determined to be unreasonable and offensive to the plaintiffs according to prevailing standards of propriety in the community.

If the courts find this suggested extension of privacy protection objectionable, they could use the old principle of property in a name to curtail the unauthorized use of the names of private and public figures — particularly those deceased. It seems logical and just that profits derived from the commercial appropriation of the name, likeness, or personality of a deceased should be realized by the natural objects of the decedent's bounty, rather than by some unknown third party. Whether the courts prefer to extend the accepted application of the tort law of privacy or adopt the property-right theory suggested, relatives should find protection from the type of commercial exploitation and injured feelings illustrated in the instant case.

D.A.K.

Gain From Sale of Restricted Stock Option Taxable as Ordinary Income

An employee-optionee sold a restricted stock option to his employer-optionor who was distributing the corporate assets in a complete liquidation. The optionee paid capital gains tax on the amount received; but, following amendment of the applicable statute, the gain was retroactively assessed by the Commissioner of Internal Revenue at ordinary income rates. The disputed tax was paid and this refund suit instituted. The district court upheld the determination of the Commissioner, and taxpayer appealed to the Court of Appeals for the Fifth Circuit. *Held*, affirmed. The gain resulting from the sale of a restricted stock option by the optionee to a liquidating optionor is taxable as ordinary income to the optionee. *Rank v. United States*, 345 F.2d 337 (5th Cir. 1965).

The taxation of employee stock options has been given varied and often conflicting treatment by the courts and the Internal Revenue Service. The Commissioner of Internal Revenue originally took the position that the grant of such options was compensation to the employee and taxable as ordinary income upon exercise.¹ The Commissioner's position was rejected in *Geese-man v. Commissioner*,² where the Tax Court enunciated the "compensatory-proprietary" test, which examined the intent of the optionor to determine whether the option was granted as compensation or as an incentive device. The Commissioner acquiesced in this test, ruling that ordinary income would result

tional distress. In the instant case, a jury would have to decide whether the injuries were slight or "severe mental disturbances inflicted by intentional actions wholly lacking in social utility." *Id.* at 85, 174 N.E.2d at 164. See *March v. Cacioppo*, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962).

¹ T.D. 3435, II-1 CUM. BULL. 50 (1923).

² 38 B.T.A. 258 (1938).

upon exercise only if the options were in the nature of compensation.³ When the Supreme Court held in *Commissioner v. Smith*⁴ that an employee stock option was taxable as ordinary income upon exercise, the Commissioner returned to his original position, even though the Court had ostensibly employed the "compensatory-proprietary" test to reach its decision.⁵

Congress, recognizing that *Smith* and the Commissioner's resulting regulation obstructed the use of employee stock options as incentive devices,⁶ attempted to remove those impediments by enacting the restricted stock option provision (hereinafter referred to as section 421).⁷ Under section 421, a capital gains tax is assessed at the time the stock received from the exercise of the option is sold, provided certain statutory requirements are met.⁸ Since this enactment, litigation involving taxation under the restricted stock option provision has been infrequent.⁹

The taxation of options not covered by section 421 (hereinafter referred to as nonrestricted stock options) continued to be troublesome,¹⁰ however, and the question again came before the Supreme Court in *Commissioner v. LoBue*.¹¹ The Court held that the stock received from the exercise of a nonrestricted stock option was compensatory. Furthermore, the optionor's intention in granting the option was immaterial in light of the Internal Revenue Code's broad definition of income.¹² The Court thus strengthened the Commissioner's post-

³ T.D. 4879, 1939-1 CUM. BULL. 159.

⁴ 324 U.S. 177 (1945).

⁵ T.D. 5507, 1946-1 CUM. BULL. 18.

⁶ At the present time the taxation of these options is governed by regulations which impede the use of the employee stock option for incentive purposes. Moreover, your committee believes these regulations go beyond the decision of the Supreme Court in *Commissioner v. Smith*, 324 U.S. 177 (1945)....

Since the employee does not realize cash income at the time the option is exercised, an imposition of a tax at that time often works a real hardship. An immediate sale of a portion of the stock acquired under the option may be necessary in order to finance the payment of the tax. This, of course, reduces the effectiveness of the option as an incentive device.

S. REP. NO. 2375, 81st Cong., 2d Sess. 59-60 (1950).

⁷ Int. Rev. Code of 1939, § 130A, added by ch. 994, 64 Stat. 942 (1950) (now INT. REV. CODE OF 1964, §§ 421-25).

⁸ These requirements were: (a) optionee had to be an employee of optionor; (b) option price had to be at least 85% of market price at date of grant; (c) option could not be transferred by optionee except on death; (d) optionee could not own more than 10% of the total combined voting stock of the corporation at the date of grant; (e) there had to be a ten-year expiration period within which the option must be exercised. After exercise of the option there could be no disposition of the stock acquired within two years from the date of grant or six months from the date of exercise. Int. Rev. Code of 1939, § 130A, added by ch. 994, 64 Stat. 942 (1950) (now INT. REV. CODE OF 1964, §§ 421-25).

⁹ Of corporations listed on the New York Stock Exchange, 8 had stock option plans prior to 1950, 269 by 1954, and 714 by mid-1961. Baker, *Employee Stock Option Plans Under the Revenue Act of 1964*, 20 TAX L. REV. 77, 78 (1964). Yet Shepard's *United States Citations* shows only 20 decisions involving any mention of § 421.

¹⁰ The continuation of the problem was caused by the phrase "options which do not qualify as 'restricted stock options' will continue to be taxed as under existing law." S. REP. NO. 2375, 81st Cong., 2d Sess. 60 (1950). For a discussion of the problems caused by this language, see Comment, *Taxation of the Stock Option as Intended Compensation*, 9 U.C.L.A.L. REV. 703 (1962).

¹¹ 351 U.S. 243 (1956).

¹² INT. REV. CODE OF 1964, § 61(a).

Smith position by ruling that the "compensatory-proprietary" test had "no statutory basis."¹³

Contemporaneously with this development of the taxation of exercised stock options, the Commissioner ruled that all unexercised options were considered capital assets if the optionee was not engaged in the business of dealing in options.¹⁴ Thus, the sale of an option could give rise to a capital gain or loss. Congress, however, modified this position in 1954 by enacting section 1234(a), which limits capital gains treatment to those options that relate to property which would be a capital asset in the optionee's hands.¹⁵ Capital gains treatment was further limited by a 1958 amendment which, in part, excludes from the scope of section 1234(a) the gain on any sale that is given noncapital gains treatment by any other section of the code.¹⁶ According to the legislative history, this section was designed to deny capital gains treatment to employee stock options that are "in the nature of compensation" to the employee.¹⁷

In the instant case, the taxpayer received an option from his employer in 1952 which met the statutory requirements for a restricted stock option.¹⁸ Four years later, the employer, to effectuate a corporate liquidation under section 337,¹⁹ offered to buy the taxpayer's unexercised option.²⁰ The offer was accepted, and, relying on section 1234 as it existed in 1956, the taxpayer paid capital gains tax on the amount received.²¹ On the basis of the 1958 amend-

¹³ *Commissioner v. LoBue*, 351 U.S. 243, 247 (1956). Dictum to the effect that the option itself might be the only intended compensation created another judicially formed test for tax treatment in the *Smith* decision. *Commissioner v. Smith*, 324 U.S. 177, 182 (1945). Lower courts employed this dictum wherever an option had a readily ascertainable market value upon issuance. If the optionee paid ordinary income tax on this value, any further gain upon exercise of the option would be taxable as a capital gain. *E.g.*, *Commissioner v. Stone's Estate*, 210 F.2d 33 (3d Cir. 1954); *McNamara v. Commissioner*, 210 F.2d 505 (7th Cir. 1954). The Court in *LoBue* apparently approved of this method of achieving capital gains rates. "It is of course possible for the recipient of a stock option to realize an immediate taxable gain." *Commissioner v. LoBue*, 351 U.S. 243, 249 (1956).

¹⁴ G.C.M. 23677, 1943 CUM. BULL. 370.

¹⁵ "Gain or loss attributable to the sale . . . of [an] . . . option to buy or sell property shall be considered gain or loss from the sale . . . of property which has the same character as the property to which the option or privilege relates . . ." Int. Rev. Code of 1954, § 1234, 68A Stat. 329 (now INT. REV. CODE OF 1964, § 1234(a)).

¹⁶ "(c) Non-application of section. — This section shall not apply to . . . (2) in the case of gain attributable to the sale or exchange of a privilege or option, any income derived in connection with such privilege or option which, without regard to this section, is treated as other than gain from the sale . . . of a capital asset . . ." INT. REV. CODE OF 1964, § 1234(c)(2).

¹⁷ S. REP. NO. 1983, 85th Cong., 2d Sess. 78 (1958).

¹⁸ Instant case at 339 n.4.

¹⁹ This section provides that no gain or loss will be recognized on the liquidation of a corporation where such corporation adopts and carries through a plan of complete liquidation of all assets (less those retained to meet claims) within a twelve-month period. INT. REV. CODE OF 1964, § 337.

²⁰ Instant case at 339 n.7. The price offered amounted to the difference between the liquidation value of the stock and the price at which it could be purchased under the option.

²¹ In 1956 this section provided: "Gain or loss attributable to the sale . . . of [an] . . . option to buy or sell property which in the hands of the taxpayer constitutes (or if acquired would constitute) a capital asset shall be considered gain or loss from the sale . . . of a capital asset . . ." Int. Rev. Code of 1954, § 1234, 68A Stat. 329 (now INT. REV. CODE OF 1964, § 1234(a)).

ment to section 1234, which added the compensatory option exclusion section, 1234(c) (2), the Commissioner retroactively assessed the gain as ordinary income. In this refund suit to recover the disputed amount, the taxpayer contended that the option was a capital asset,²² and, since it had been held longer than six months, the gain on its sale should qualify for long-term capital gains treatment.²³ The government asserted that this option was subject to the capital gains limitation of section 1234; and, since it was compensatory in nature, it was excluded from capital gains rates by the compensatory option exclusion section, 1234(c) (2). Taxpayer answered this argument by showing that the option was purchased solely to remove impediments to liquidation and was in no way intended as compensation. Furthermore, even if the option was compensatory, section 1234(c) (4), which was also added by the 1958 amendment, makes all of section 1234 inapplicable to options acquired prior to March 1, 1954.²⁴ Thus, the taxpayer concluded that, since he had received the option prior to the critical date, the sale should be taxed according to the prior law.²⁵

In denying the recovery sought, the court reasoned that under the broad rationale of *LoBue*, this option was compensatory and thus subject to ordinary income taxation, unless there was statutory amelioration of the tax consequences. The court then determined that section 1234(c) (2) denied capital gains rates to the sale of compensatory employee stock options.²⁶ Furthermore, section 1234(c) (4) did not exempt this option from section 1234 because, according to the court, it was "inconceivable" that Congress would permit capital gains benefits to pre-1954 options that were given as compensation after excluding them in section 1234(c) (2).²⁷

In summarily dismissing the applicability of section 1234(c) (4) as "inconceivable," the instant court misconstrued the purpose and scope of section 1234. As originally enacted in 1954, its purpose was to change the "existing law" which accorded options themselves the status of a capital asset, and hence a capital gain, so long as the optionee was not a dealer in options.²⁸ The effect of this congressional action is to allow capital gains treatment on the sale of an option only if the property to which the option relates would be a capital asset

²² Brief for Appellant, pp. 9-10, *Rank v. United States*, 345 F.2d 337 (5th Cir. 1965).

Since the option is not one of the excluded items under the appropriate section of the code, it has been held to be a capital asset. "[T]he term 'capital asset' . . . does not include . . . (1) stock in trade . . . (2) property . . . subject to . . . depreciation . . . (3) a copyright . . . (4) accounts . . . receivable . . . (5) an obligation of the United States" INT. REV. CODE OF 1964, § 1221. See *e.g.*, *Milliken v. Commissioner*, 196 F.2d 135 (2d Cir.), *cert. denied*, 344 U.S. 884 (1952); *Alley v. United States*, 12 Am. Fed. Tax R.2d 5436 (N.D. Ind. 1963).

²³ "The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months" INT. REV. CODE OF 1964, § 1222(3).

²⁴ "(c) Non-application of section. — This section shall not apply to . . . (4) gain attributable to the sale or exchange of a privilege or option acquired by the taxpayer before March 1, 1954, if in the hands of the taxpayer such privilege or option is a capital asset." INT. REV. CODE OF 1964, § 1234(c) (4).

²⁵ G.C.M. 23677, 1943 CUM. BULL. 370. See also *Milliken v. Commissioner*, 196 F.2d 135 (2d Cir.), *cert. denied*, 344 U.S. 884 (1952); *Alley v. United States*, 12 Am. Fed. Tax R.2d 5436 (N.D. Ind. 1963).

²⁶ S. REP. NO. 1983, 85th Cong., 2d Sess. 78 (1958).

²⁷ Instant case at 345.

²⁸ See note 14 *supra* and accompanying text.

in the holder's hands. Most important, however, this change in the law was only to be effective for those "options acquired after February 28, 1954."²⁹ Options received prior to that date would continue to be taxed under the existing law.³⁰ When the capital gains treatment of the sale of stock options was further limited by the addition of section 1234(c) in 1958, Congress, by including section 1234(c) (4), indicated as clearly as possible that this further restriction, like the original enactment of section 1234, was not to affect those pre-1954 options. Thus, there is a statutory basis for according the favorable tax rate to options acquired prior to March 1, 1954, regardless of whether the option is compensatory.

Since the majority of future litigation will involve options acquired after 1954, the most important aspect of the instant case is the determination that a restricted stock option is compensatory. Such a finding is in direct conflict with the legislative history of sections 421 and 1234, as well as the statutes themselves. The Senate report accompanying section 421 unequivocally states that the options qualifying under the statute are "regarded as incentive devices rather than compensation."³¹ Since restricted stock options are regarded by Congress as noncompensatory, the statute does not allow a business expense deduction to the corporation issuing the option.³² By limiting the compensatory option exclusion section, 1234(c) (2), to employee stock options "in the nature of compensation," Congress implicitly recognizes that there are employee stock options which are not compensatory.³³ Since restricted stock options are "regarded as incentive devices rather than compensation," it seems apparent that they are not within the purview of section 1234(c) (2). The employment of *LoBue* to bring a restriction stock option within the exclusion of section 1234(c) (2) seems clearly inconsistent with the express desires of Congress.

In the *Internal Revenue Code of 1964*, the restricted stock option was replaced by the qualified stock option,³⁴ the statutory requirements were made even more severe,³⁵ and the holding period for the stock acquired through

²⁹ The Internal Revenue Service has ruled that under existing law an option, like any other property right, is subject to the general capital gain provisions of section 1221 and, hence, its sale may give rise to a capital gain or loss where the holder is not in the business of dealing in such options (G. C. M. 23677). The bill provides that in determining whether or not a capital transaction is involved, the character of the property to which the option relates should be controlling. This section changes existing law to the extent that options acquired after February 28, 1954, are regarded as capital assets only where the underlying property constitutes, or if acquired would constitute, a capital asset in the hands of the holder.

S. REP. NO. 1622, 83d Cong., 2d Sess. 438 (1954).

³⁰ *Ibid.*

³¹ S. REP. NO. 2375, 81st Cong., 2d Sess. 60 (1950).

³² INT. REV. CODE OF 1964, § 421(a) (2).

³³ See note 17 *supra* and accompanying text.

³⁴ INT. REV. CODE OF 1964, § 422.

³⁵ Under the new provisions, the qualified stock option must (a) be issued pursuant to a plan approved by the stockholders; (b) be granted within ten years from the date of approval of the plan by the stockholders; (c) not be exercisable more than five years after the date of grant; (d) have an option price not less than the market price at the date of grant; (e) not be exercisable while any other qualified or restricted stock option is still outstanding; (f) not be transferable; (g) not be granted to any employee who owns more

exercise of the option was increased.³⁶ The legislative history of these options denotes that, just as restricted stock options were designed to be incentive devices,³⁷ the changes under the qualified stock option provision would assure their use as incentive devices by giving employees a "stake in the business."³⁸ Furthermore, in enacting the original restricted stock option provision, Congress indicated that the statutory requirements would serve to exclude, from the favorable tax rate, options which were not "true incentive devices."³⁹ Since the restrictions are even more severe under the 1964 Code, the use of qualified stock options as compensation would seem, as a practical matter, to be eliminated. Finally, the qualified stock option statute, like the restricted stock option before it, allows no business expense deduction to the employer,⁴⁰ a further indication that they are regarded as incentive devices.⁴¹ Thus, the conclusion that a restricted stock option is noncompensatory and hence not within the scope of section 1234(c) (2) has equal validity when applied to the qualified stock option. Future litigation involving the sale of either restricted or qualified stock options should not be controlled by the precedent of the instant case, but should be resolved by placing primary emphasis on the legislative purpose to ensure that the applicable statutes receive the intended implementation.

J.B.N.

Jurisdiction Over Foreign Executor Allowed After Order for Final Distribution

Following a California order of final distribution, a Utah District Court entered a garnishee judgment against a California executor domiciled in Utah in a suit brought by a judgment creditor of a legatee. The executor's subsequent motion to set aside the judgment was granted on the ground that Utah had no jurisdiction over foreign-appointed executors. On appeal, the Utah Supreme Court *held*, reversed. The executor became a debtor of the legatee upon entry of the order of final distribution, and his presence in Utah conferred jurisdiction over his person for purposes of garnishment. *Lang v. Lang*, 403 P.2d 665 (Utah 1965).

Although a number of early cases propounded the doctrine of jurisdictional immunity of foreign executors and administrators,¹ many recent decisions tend

than 5% of the total voting stock; and (h) be issued only to an employee of the issuing corporation. INT. REV. CODE OF 1964, § 422(b).

³⁶ INT. REV. CODE OF 1964, § 422(a)(1).

³⁷ S. REP. NO. 2375, 81st Cong., 2d Sess. 59-60 (1950).

³⁸ H.R. REP. NO. 749, 88th Cong., 1st Sess. 67 (1963).

³⁹ S. REP. NO. 2375, 81st Cong., 2d Sess. 60 (1950).

⁴⁰ INT. REV. CODE OF 1964, § 421(a)(2).

⁴¹ "Since the options which qualify for special treatment are regarded as incentive devices rather than compensation, no deduction is allowed the corporation . . ." S. REP. NO. 2375, 81st Cong., 2d Sess. 60 (1950).

¹ The doctrine of jurisdictional immunity has its roots in the opinion of Justice Story in the leading case of *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1 (1841), in which he said,

to be more liberal in finding jurisdiction.² Commensurate with this judicial trend, a number of states have enacted statutory exceptions to the immunity doctrine either by allowing service of process on foreign executors and administrators of nonresident motorists,³ or by conferring ordinary jurisdiction over all foreign personal representatives who enter the state.⁴ Contrary to the more liberal trend, a strong dictum in the leading Utah case of *Wilcox v. District Court*⁵ declared foreign personal representatives absolutely immune to suit.⁶

The court in the instant case disregarded the uncompromising language of *Wilcox*, reasoning that, since final distribution had been ordered, the executor was an ordinary debtor subject to garnishment by creditors of the legatees. Brushing aside assertions that the funds of the estate had their situs in California and that the executor, as a foreign personal representative, should enjoy immunity from suit in Utah, the court concluded that, since the executor was essentially an ordinary debtor, he was subject to garnishment jurisdiction wherever he could be personally served.

In its only reference to *Wilcox*,⁷ the court made the distinction that in *Wilcox* the personal representative was in California when the plaintiff attempted to sue in Utah,⁸ whereas in the instant case the executor was not only physically present in Utah, but a Utah resident as well. This difference is significant in light of the principle of forum conveniens, which suggests that litigation be con-

Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it . . . [H]ence it has become an established doctrine that an administrator, appointed in one state . . . is not liable to be sued in that capacity in the Courts of [another state] . . .

Id. at 5-6. Since that decision, a long line of cases has adhered to the doctrine of jurisdictional immunity. See, e.g., *Pirkle v. Cassity*, 104 F. Supp. 318, 321 (E.D. Tex. 1952); *Winbigler v. Shattuck*, 50 Cal. App. 562, 195 Pac. 707 (Dist. Ct. App. 1920); *Hargrave v. Turner Lumber Co.*, 194 La. 285, 294, 193 So. 648, 651 (1940); *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925); *Wirgman v. Provident Life & Trust Co.*, 79 W. Va. 562, 567, 92 S.E. 415, 416 (1917) (dictum). A good discussion of the immunity position is found in STUMBERG, *CONFLICT OF LAWS* 404-06 (3d ed. 1963). For a list of jurisdictions subscribing to the immunity doctrine, see EHRENZWEIG, *CONFLICT OF LAWS* § 23, at 63 n.17 (1963).

² *E.g.*, *Brown v. Hughes*, 136 F. Supp. 55, 58-59 (M.D. Pa. 1955); *Leighton v. Roper*, 300 N.Y. 434, 438-41, 91 N.E.2d 876, 878-80 (1950). See EHRENZWEIG, *CONFLICT OF LAWS* § 23, at 63 n.17 (1963). Compare RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 512 (Tent. Draft No. 11, 1965), with RESTATEMENT, *CONFLICT OF LAWS* § 512 (1934).

³ Seventeen states have added provisions to their nonresident motorist statutes allowing jurisdiction over the foreign motorist's personal representative in the event of the death of the foreign motorist. *E.g.*, CAL. VEHICLE CODE § 17452; N.Y. VEHICLE & TRAFFIC LAW § 253. See EHRENZWEIG, *CONFLICT OF LAWS* § 23, at 62 & n.11 (1963); Comment, 1958 Wis. L. REV. 425, 432 & n.26. Utah allows only for service of the nonresident motorist himself. UTAH CODE ANN. § 41-12-8 (Repl. vol. 1963).

⁴ *E.g.*, KAN. GEN. STAT. ANN. § 59-1708 (1949); N.J. STAT. ANN. § 3A:12-7 (1953). See EHRENZWEIG, *CONFLICT OF LAWS* § 23, at 62 n.10 (1963).

⁵ 2 Utah 2d 227, 272 P.2d 157 (1954).

⁶ "[A] personal representative of a deceased person can sue or be sued . . . only in the state where he was appointed . . ." *Id.* at 228, 272 P.2d at 158. But see *id.* at 229, 272 P.2d at 158-59 (concurring opinion). It is possible that this extreme position resulted from the respondent's attempt to serve a California executrix residing in the forum of her appointment.

⁷ Instant case at 657 n.5.

⁸ *Wilcox v. District Court*, 2 Utah 2d 227, 228, 272 P.2d 157, 158 (1954).

ducted where it is most convenient for the parties.⁹ A second clear distinction between the cases was overlooked by the court. The attempt in *Wilcox* was to assert continuing jurisdiction over a nonresident foreign executrix to enforce a child-support decree entered against the decedent during his lifetime. Not only was the *Wilcox* executrix outside the jurisdiction, but there was no possible element of personal liability between the parties to the suit.¹⁰

Although it devoted insufficient attention to *Wilcox*, the court did accurately apply the law of garnishment to the instant case. It is well settled that a legatee's distributive share is garnishable in the hands of the executor upon final decree of distribution.¹¹ Moreover, the court's assertion that jurisdiction attaches when the garnishee is properly served within the state, regardless of the "location" of the debt, is adequately supported by prior decisions.¹² However, inasmuch as neither of these two principles deals with the issue of jurisdiction over a *foreign* executor, this issue requires deeper analysis than that afforded in the opinion — particularly in light of the strong dictum to the contrary in *Wilcox*.

The court did not entirely disregard this issue, since it recognized that the action was brought and judgment entered against the respondent as "executor of the estate of John Lang, deceased,"¹³ but this point was summarily dismissed as involving only a nicety as to name or title.¹⁴ Certainly, it is a sound principle that equity and substantive justice are far more important than mere titular designations, but it is by no means as clear that such "niceties" may, therefore, be ignored entirely. This is particularly apparent when it is considered that entry of the final decree of distribution gives an executor added personal responsibility to the legatees, but in no way eliminates his responsibility to the

⁹ See STUMBERG, CONFLICT OF LAWS 166 (3d ed. 1963); Ehrenzweig, *The Transient Rule of Personal Jurisdiction — The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 312-13 (1956). See generally EHRENZWEIG, CONFLICT OF LAWS §§ 34-44 (1963).

¹⁰ The court's reasoning in the instant case depended heavily on the element of personal liability of the executor as a debtor of the legatee, through whom the plaintiff's claim originated. In *Wilcox*, the plaintiff's claim ran directly between plaintiff and decedent and involved none of the legatees. Therefore, though the executrix may well have become personally liable to the legatees under the decedent's will upon order for final distribution of the estate, this personal liability in no way related to the plaintiff.

¹¹ *In re Durel*, 10 F.2d 448, 450 (9th Cir.) (dictum), *cert. denied*, 273 U.S. 699 (1926); *In re Nerac*, 35 Cal. 392 (1868); *In re Rade's Estate*, 259 Wis. 169, 173, 47 N.W.2d 891, 893 (1951) (dictum); 4 BANCROFT, PROBATE PRACTICE § 1179, at 504 (2d ed. 1950); see Annot., 59 A.L.R. 768, 777 (1926); *cf.* *Ward v. Commissioner*, 224 F.2d 547, 552 (9th Cir. 1955); *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518 (1891).

¹² Most courts reason that a debt has no legal situs and moves from place to place with the debtor. It is an intangible, which, in contrast with tangible objects, has situs only in the sense that it is personal to the debtor and is present wherever he can be found. *E.g.*, *Harris v. Balk*, 198 U.S. 215 (1905); *Bristol v. Brent*, 38 Utah 58, 70, 110 Pac. 356, 361 (1910); see STUMBERG, CONFLICT OF LAWS 104 (3d ed. 1963); Comment, 31 YALE L.J. 425 (1922). A good discussion of the *Harris* doctrine is found in EHRENZWEIG, CONFLICT OF LAWS § 29 (1963). See generally Swenson, *Conflict of Laws Problems Under the Iowa Garnishment Statutes*, 34 IOWA L. REV. 605, 612 (1949).

¹³ Instant case at 656; Brief for Appellant, p. 12.

¹⁴ Instant case at 657.

appointing court.¹⁵ His official status as an officer of the court is not diminished until distribution is complete, an accounting is filed, and he is dismissed by the court.¹⁶ Therefore, until he has been discharged, his title of executor should be respected.

Accordingly, instead of simply equating the foreign executor acting under the final decree of a probate court with an ordinary debtor, thus making an exception to *Wilcox* by implication, the court might have made the exception explicit and delineated its limits by analogizing to other exceptions commonly made to the doctrine of jurisdictional immunity.¹⁷ For example, an executor is personally liable for tortious handling of the affairs of the estate¹⁸ or for any contractual obligations incurred by him during the course of his administration,¹⁹ and such instances normally give rise to exceptions to the immunity rule.²⁰ Extrajurisdictional appointment should not shield an executor or administrator from responsibility for his own acts or obligations any more than any other individual subject to personal liability should be artificially protected from otherwise well-founded legal process.

The court was correct insofar as it recognized that, due to the peculiar relationship of the parties, garnishment proceedings similarly exhibit this characteristic of personal liability. Such proceedings involve three parties: a primary creditor-plaintiff; a primary debtor-defendant; and a third-party debtor-garnishee who is indebted to the defendant. Under the rule in the leading United States Supreme Court case of *Harris v. Balk*,²¹ personal jurisdiction over the defendant need not be obtained, and the action in garnishment may proceed where personal jurisdiction over the garnishee obtains.²² Such an action proceeds quasi in rem only to secure jurisdiction over the defendant;²³

¹⁵ See *Lindley v. United States*, 59 F.2d 336, 338 (9th Cir. 1932); *Society of Cal. Pioneers v. McElroy*, 63 Cal. App. 2d 332, 146 P.2d 962 (Dist. Ct. App. 1944); *In re Brooks' Estate*, 83 Utah 506, 514, 30 P.2d 1065, 1068 (1934); UTAH CODE ANN. § 75-12-19 (1953); 4 BANCROFT, PROBATE PRACTICE § 1181, at 506 (2d ed. 1950).

¹⁶ CAL. PROB. CODE § 1066; UTAH CODE ANN. § 75-12-19 (1953); see 4 BANCROFT, PROBATE PRACTICE § 1181, at 506-07 (2d ed. 1950).

¹⁷ See GOODRICH, CONFLICT OF LAWS § 190 (3d ed. 1949); RESTATEMENT (SECOND), CONFLICT OF LAWS § 515 (Tent. Draft No. 11, 1965).

¹⁸ *E.g.*, *Crowe v. DiManno*, 225 F.2d 652, 654 (1st Cir. 1955); *Kirchner v. Muller*, 280 N.Y. 23, 28, 19 N.E.2d 665, 667 (1939); RESTATEMENT (SECOND), CONFLICT OF LAWS § 515 (Tent. Draft No. 11, 1965); see *Culver v. Pickins*, 169 S.W.2d 523, 529 (Tex. Civ. App.), *rev'd on other grounds*, 142 Tex. 87, 176 S.W.2d 167 (1943).

¹⁹ *E.g.*, *Taunton v. Taylor*, 37 Ga. App. 695, 141 S.E. 511 (Ct. App. 1928); *Allen v. Armfield*, 190 N.C. 870, 129 S.E. 801 (1925); *Phelps v. Exchange Bank of Commerce*, 181 Okla. 145, 73 P.2d 137 (1937); RESTATEMENT (SECOND), CONFLICT OF LAWS § 515 (Tent. Draft No. 11, 1965).

²⁰ A few jurisdictions also make exception to the immunity rule where the foreign executor or administrator is domiciled within the state. *E.g.*, *Colbert v. Daniel*, 32 Ala. 314, 330-31 (1858); *Johnson v. Jackson*, 56 Ga. 326 (1876); *McAndrews v. Krause*, 245 Minn. 85, 71 N.W.2d 153 (1955) (only when there are assets of the estate in the jurisdiction).

²¹ 198 U.S. 215 (1905).

²² *Id.* at 226-27; *Bristol v. Brent*, 38 Utah 58, 70, 110 Pac. 356, 361 (1910).

²³ As applied in garnishment proceedings, quasi in rem jurisdiction is a fictional tool employed by the courts in place of personal service to satisfy the requirements of due process and *res judicata* as to the defendant outside the jurisdiction. It is reasoned that property is always in the constructive possession of the owner, and the presence of the

essentially, the suit against the garnishee is in personam.²⁴ However, it is difficult to apply this rationale in the instant case because the garnishee was not merely an ordinary debtor, but a foreign-appointed executor who, according to the *Wilcox* case, was entitled to jurisdictional immunity in Utah. Thus, although legacies in the hands of an executor are generally garnishable after the final decree of distribution, this fact alone does not settle the key question of whether jurisdiction obtains over the executor-garnishee in the instant case, and a specific exception to the immunity rule is called for.

In effect, the court has made such an exception, albeit only by implication. Because of the court's failure to face the issue squarely, it has made the impact of the case difficult to assess. However, in view of the result in the instant case, as well as analogous decisions in other jurisdictions and their underlying policy considerations, Utah will probably continue to recognize additional exceptions to the immunity doctrine and confine the *Wilcox* dictum accordingly. This does not necessarily mean that the court will be ready to completely disregard *Wilcox*; there is a major conceptual difference between allowing exceptions to the rule and challenging the rule itself. However, the instant case still presents a stepping stone in the direction of allowing jurisdiction over all foreign-appointed administrators and executors, should the court feel constrained to take this course at some future time.

There is considerable support for taking such a tack. For example, one writer suggests that the doctrine of jurisdictional immunity never should have been the general rule and challenges the historical support normally relied upon as its basis.²⁵ It has been argued, however, that immunity aids centralized administration of estates by keeping all the affairs of administration under the supervision of the initial probate court.²⁶ Nevertheless, present applicability of this argument is questionable since ancillary administration has become commonplace.²⁷ Another argument advanced has been that if suit against the foreign representative is allowed, it follows naturally that he must also be

debt (intangible property), therefore, confers jurisdiction over him to whom it is owed. See *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877) (dictum); EHRENZWEIG, *CONFLICT OF LAWS* § 29 (1963).

²⁴ See EHRENZWEIG, *CONFLICT OF LAWS* § 29 (1963). This is particularly evident when it is considered that the law of garnishment imposes strict liability on the garnishee. Once he has been served with the writ of garnishment, he is personally liable to the garnishor. *Koontz v. Baltimore & O.R.R.*, 220 Mass. 285, 289, 107 N.E. 973, 974 (1915); *Graham v. Hidden Lake Copper Co.*, 53 Utah 230, 234, 178 Pac. 64, 65-66 (1919); see UTAH R. CIV. P. 64D(a). It is sometimes reasoned that the garnishor, after service of the writ, stands in the shoes of the defendant and is subrogated to his rights in personam against the garnishee. *Consolidated Nat'l Bank v. Reiniger Mining & Smelting Co.*, 111 Cal. App. 64, 66-67, 295 Pac. 79, 80 (Dist. Ct. App. 1931).

²⁵ Professor Ehrenzweig asserts that, though the writings of both Kent and Story strongly advocate immunity, the authorities and the reasoning relied upon by these and subsequent writers do not, in fact, support their proposition. Thus, the doctrine that became the general rule should never have achieved such status. See EHRENZWEIG, *CONFLICT OF LAWS* § 14, at 47-48, § 23, at 60-61 (1963).

²⁶ See *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1, 5-6 (1841) (dictum); *Helme v. Buckelew*, 229 N.Y. 363, 372, 128 N.E. 216, 217 (1920) (dictum); GOODRICH, *CONFLICT OF LAWS* § 190 (3d ed. 1949); Goodrich, *Problems of Foreign Administration*, 39 HARV. L. REV. 797, 821 (1926).

²⁷ See EHRENZWEIG, *CONFLICT OF LAWS* § 23, at 61 (1963); Note, 56 COLUM. L. REV. 915, 927 (1956).

allowed to sue. Successful suit by a foreign executor, if unknown to local creditors of the decedent, might result in discrimination against them. By removing the decedent's assets from the jurisdiction, the foreign executor would force local creditors to travel outside their state to satisfy disputed claims. However, an alert local creditor can adequately avoid the danger of the assets being removed from his state by a timely demand for ancillary appointment.²⁸ Furthermore, statutory successors are very similar in nature to executors and administrators and have long been treated as ordinary individuals for jurisdictional purposes, suggesting similar treatment for their probate counterparts.²⁹ Such arguments intimate that the doctrine of jurisdictional immunity is armed with little rational support and may well be a legal anachronism. Thus, the Utah court might well consider not only recognizing general exceptions to the immunity rule, but eventually joining other jurisdictions in abrogating the doctrine of immunity itself.

S.T.W.

Interstate Defamation — Long-Arm Service of Process Upon Syndicated Columnist Upheld

Defendant is a syndicated columnist whose column is distributed nationally by Bell Syndicates and published in Louisiana by two widely circulated newspapers. Plaintiff filed a complaint alleging that she had been libeled in one of defendant's columns, and service of process was made upon defendant in Washington, D.C., pursuant to the recently enacted Louisiana long-arm statute.¹ The federal district court *held* that service upon a nonresident author of a syndicated column was within the Louisiana statute and consonant with due process. *Coreil v. Pearson*, 242 F. Supp. 802 (W.D. La. 1965).

To acquire personal jurisdiction at common law, a court had to have physical power over the defendant; this required service of process within the forum.² The initial movement to abandon this doctrine was made by courts

²⁸ A closely related argument was once based on discriminatory practices in the distribution of estates. In many jurisdictions, local creditors were often given priority over foreign creditors, but the United States Supreme Court, in *Blake v. McClung*, 172 U.S. 239, 258-59 (1898), held that foreign and local creditors of a corporation in the hands of a receiver must be given equal treatment. There is no logical ground why the rule should not also apply to the administration of estates. See Cheatham, *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 COLUM. L. REV. 549, 556-57 (1944); Note, 56 COLUM. L. REV. 915, 926 & n.100 (1956); RESTATEMENT (SECOND), CONFLICT OF LAWS § 497 (Tent. Draft No. 11, 1965).

²⁹ Cheatham, *supra* note 28, at 557, 559-60. One additional argument asserts that the numerous exceptions to the immunity rule seriously weaken its effect and make questionable its validity. See *id.* at 557-58; EHRENZWEIG, CONFLICT OF LAWS § 23 (1963). Another commentator suggests that considerations of comity and the added expense, delay, and inconvenience of requiring foreign creditors and other claimants to enforce their claims exclusively in the domicile of the decedent render the immunity rule impracticable. See Note, 56 COLUM. L. REV. 915, 926-29 (1956). For additional arguments, see *id.* at 929-39.

¹ La. Acts 1964, No. 47, § 3201, at 106.

² *Pennoyer v. Neff*, 95 U.S. 714 (1877). A good discussion of the developments in the law since *Pennoyer* is found in Reese & Galston, *Doing an Act or Causing Consequences as Basis for Jurisdiction*, 44 IOWA L. REV. 249 (1959).

permitting service of process on foreign corporations doing business in the state, and was based on the state's power to exclude foreign corporations from transacting business within its boundaries.³ The first inroad upon the physical-power doctrine of in personam jurisdiction over nonresident individuals was made by courts upholding service upon nonresident motorists involved in accidents within the state.⁴ This judicial erosion of the physical-power concept culminated on the "minimum contacts" test developed by the Supreme Court in *International Shoe v. Washington*:⁵

[D]ue process requires only that in order to subject the defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the "traditional notions of fair play and substantial justice."⁶

This liberalization of jurisdictional requirements provided the impetus for passage of state long-arm statutes granting broad jurisdiction over nonresidents.⁷

The court in the instant case held that defendant could be served under the Louisiana long-arm statute⁸ because he had either contracted to supply services

³ See Sobeloff, *Jurisdiction of State Courts Over Nonresidents in Our Federal System*, 43 CORNELL L.Q. 196, 200 (1957).

⁴ The Supreme Court upheld service of process under a nonresident-motorist statute in *Hess v. Pawloski*, 274 U.S. 352 (1927). The Court reasoned that the state has power to regulate traffic on its highways and, as a result, could require a nonresident motorist to appoint one of its officials as agent for service of process as a prerequisite to use of such highways.

⁵ 326 U.S. 310 (1945).

⁶ *Id.* at 316, quoting from *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). This concept of "fair play and substantial justice" in the area of personal jurisdiction was first used by Justice Holmes in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

International Shoe has been interpreted as having broadened the scope of state in personam jurisdiction. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The Supreme Court, however, placed some limitations on its extension in *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), where the Court stated:

However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that state that are a prerequisite to its exercise of power over him. . . . [I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits . . . of its laws . . .

⁷ With some minor word changes the Louisiana statute is an adoption of § 1.03 of the Uniform Interstate and International Procedure Act, promulgated in the *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. Annex III at 78-79 (1962). Arkansas adopted this act in 1963. ARK. STAT. ANN. §§ 27-2501 to -2506 (Supp. 1965). For a discussion of the Arkansas statute see Leflar, *Act 101 — Uniform Interstate and International Procedure Act*, 17 ARK. L. REV. 118 (1963). Maryland and Virginia adopted the act in 1964, MD. ANN. CODE art. 75, § 96 (Supp. 1964), VA. CODE ANN. § 8-81.2(a)(1)-(4) (Supp. 1964). For an excellent treatment of problems relating to the Virginia statute see Note, 51 VA. L. REV. 719 (1965). At least twenty-four other states have passed long-arm statutes in various forms. These states are listed in Note, 51 VA. L. REV. 719 n.4 (1965).

⁸ § 3201. Personal jurisdiction over non-residents

A court may exercise personal jurisdiction over a non-resident, who acts directly or by an agent, as to a cause of action arising from the non-resident's

(a) transacting any business in this state;

(b) contracting to supply services or things in this state;

or things within the state or had caused injury or damage within the state. This was accomplished, the court reasoned, by publication in Louisiana of material injurious to plaintiff, either by defendant or at his direction. The court also upheld the constitutionality of this service under the statute, since the required contacts were sufficient to satisfy "traditional ideas of justice and fair play."⁹

The Supreme Court has developed two criteria to determine whether federal courts should permit service of process pursuant to a state long-arm statute. It must be established: first, that defendant comes within the state court interpretation of the statute,¹⁰ and, second, that the statute as applied to the particular facts is not violative of due process.¹¹ The court may decide that the statute is constitutional but that its application in a particular case violates due process.¹² The sections of the Louisiana statute applied in the instant case must be analyzed in the light of these criteria.

The instant court held that defendant could be served under subsection 3201(b) of the Louisiana statute which authorizes service of process on a non-resident who, personally or by his agent, "contracts to supply services or things" within the state. Although this provision has not been construed by Louisiana courts, in other jurisdictions a similar provision has been construed to require that defendant have some direct connection with the forum state.¹³ While it is evident from the facts of the instant case that Pearson did not carry on personal activity in Louisiana, the court inferred that an agency relationship provided

(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

(d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . .

La. Acts 1964, No. 47, at 106.

⁹ Instant case at 805. It is unfortunate that counsel for defendant did not pursue the due process arguments. The only argument advanced in defendant's petition relates to retroactivity in application of long-arm statutes and seems to have been well settled in most jurisdictions in favor of plaintiff. Since defendant could have appealed, *Rosenblatt v. American Cynamid Co.*, 86 Sup. Ct. 1 (1965), and did not, it is unlikely that the precedent set by the instant case will be reversed.

¹⁰ It is now accepted that the federal courts must apply state long-arm statutes as interpreted by the courts of the state, under rule 4(e) of the Federal Rules of Civil Procedure. *Continental Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395 (7th Cir. 1965); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959).

¹¹ See, e.g., *Wisconsin Metal & Chem. Corp. v. DeZurik Corp.*, 222 F. Supp. 119 (E.D. Wis. 1963); *Berk v. Gordon Johnson Co.*, 212 F. Supp. 365 (E.D. Mich. 1962).

¹² See, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958); *Dahlberg Co. v. American Sound Prods., Inc.*, 179 F. Supp. 928 (D. Minn. 1959).

¹³ *Donley v. Whirlpool Corp.*, 234 F. Supp. 869, 873 (E.D. Mich. 1964); *Beck v. Gordon Johnson Co.*, 212 F. Supp. 365, 369 (E.D. Mich. 1962):

[A] state may exercise in personam jurisdiction over a foreign corporation where the cause of action arises out of an act done or transaction consummated in the forum state or where the defendant's activities have substantial connection with the state in that defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

In *Lau v. Chicago & N.W. Ry.*, 14 Wis. 2d 329, 111 N.W.2d 158 (1961), the Wisconsin court held that solicitation activities were sufficient to sustain jurisdiction.

the necessary contact.¹⁴ If the relationship between Pearson and Bell was one of principal-agent,¹⁵ Pearson could be reached under the statute, since he, through his agent, did contract to supply services in Louisiana. Although it is not clear from the court's opinion, a principal-agent relationship seems unlikely, since it presupposes that the principal controls the facilities and has a right to exercise control over the methods used by the agent.¹⁶ In making a syndication agreement, a columnist ordinarily surrenders the exclusive rights to his column for the first publication throughout the world,¹⁷ thus retaining no control over its circulation. These considerations indicate that the Pearson-Bell relationship was probably one of employer-independent contractor, since such a relationship does not require that the employer maintain an organization or have a right of control.¹⁸ On this assumption it would be an extraordinary extension of the independent-contractor concept to hold that Pearson was "contracting to supply services or things" within the state,¹⁹ since an independent contractor has no power to make contracts which are binding upon his employer.²⁰ The Louisiana Legislature recognized this distinction when it required that defendant act either directly or by his agent, thus eliminating the possibility that a defendant could be brought within the statute by acts of an independent contractor.²¹

The court also held that defendant could be served under subsections (c) and (d) of the Louisiana statute, which provide for in personam jurisdiction

¹⁴ Instant case at 805.

¹⁵ One possible interpretation of the relationship between Pearson and Bell would be that Pearson is an agent for Bell. If this is true, Pearson could not be served under the Louisiana statute, since the acts of the principal are not attributable to the agent and Pearson has no direct personal activity within the state.

¹⁶ RESTATEMENT (SECOND), AGENCY § 2 (1958).

¹⁷ The instant case makes no reference to the agreement between Pearson and Bell; however, a contract between Pearson and another syndicate set forth in *Roy v. North Am. Newspaper Alliance, Inc.*, 205 A.2d 844, 846 (N.H. 1964), indicates that Pearson gave up exclusive rights to his column for the first publication and agreed not to release anything for publication without permission of the syndicate.

¹⁸ MECHEM, AGENCY §§ 427-430 (4th ed. 1952).

¹⁹ It might be argued that the contract between Pearson and Bell Syndicates, even though made outside the state, was a "contract to supply services . . . in the state," and hence would subject defendant to jurisdiction. However, under the rule of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The contract between Pearson and Bell could not furnish sufficient contact to sustain jurisdiction under the Louisiana statute within the bounds of due process, because, under an employer-independent contractor relationship, Pearson could not be said to have purposefully availed himself of the privilege of conducting activity within that state by the making of a contract in another state. Nor could it be said that through such a contract Pearson was in a position to invoke the protection of Louisiana laws. In view of this limitation, it would seem that the Louisiana courts — in order to furnish sufficient contact to sustain the statute's constitutionality — must construe it as applying to contracts made between defendant or his agent and plaintiffs conducting substantial activity in Louisiana.

One writer is of the opinion that subsection (b) should contain the same additional requirements of soliciting, of conducting of persistent activity, or of receiving substantial revenue that are found in subsection (d). However, because the legislature did not provide these additional requirements, he feels that the courts must do so in order to preserve the constitutionality of the subsection. Note, 51 VA. L. REV. 719, 741-44 (1965).

²⁰ See MECHEM, AGENCY § 14 (4th ed. 1952).

²¹ See statute quoted in note 8 *supra*.

in actions arising from injury or damage occurring within the state. Subsection (c) applies to acts or omissions within the state, while subsection (d) involves acts or omissions outside the state. Subsection (d) requires, in addition, that defendant or his agent must regularly solicit or engage in other persistent activity within the state or derive substantial revenue from goods or services used or consumed there.

Service pursuant to statutes similar to subsection (c) has consistently been upheld where the defendant's only contact with the state was the single tortious act from which the cause of action arose.²² Some courts have also allowed long-arm service under this type of provision where the act was committed outside the state, reasoning that the tort is committed where the last necessary element occurred; since the injury is the last necessary element, the place of injury is the place of the tortious act.²³ These courts, in effect, refuse to separate act and injury.²⁴ Subsection (c), however, is more restrictive, since it requires that both the act and the injury be within the state, thus forcing the plaintiff to resort to subsection (d) if the act occurred outside the state.

Subsection (d), which allows service of process when injury is caused within the state by an act committed outside the state, also requires that defendant or his agent must solicit business or engage in some other persistent course of activity within the state, or derive substantial revenue from goods or services used or consumed therein.²⁵ This subsection appears to meet the requirements of due process, since it provides that defendant must have specific activity within the state in addition to the injury caused there. Activity in the forum by an independent contractor would not suffice, because he conducts his own, not

²² These statutes usually require the commission of a "tortious act" or "tort" within the state, rather than the causing of "injury or damage . . . through an act or omission" within the state. For a construction of the Vermont statute, VT. STAT. ANN. tit. 12, § 855 (1958), which requires the commission of a "tort" within the state, see *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951). The Illinois statute, ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1961), requires the commission of a "tortious act" within the state and has been construed in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). *But cf. Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957), which held that, where the act is outside the state but with consequences in the state, defendant cannot be served under subsection (b) of the Illinois statute.

²³ *E.g., Hutchinson v. Boyd & Sons Press Sales*, 188 F. Supp. 876 (D. Minn. 1960); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

²⁴ *But cf. Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

²⁵ Although there are statutes now in effect which are as broad as subsection (d), to date there has been no interpretive case law developed around them. Hence, the Louisiana Legislature had no guide to the construction of this provision. There was in existence, however, some case law extending statutes requiring a "tortious act" within the state to cover acts committed outside the state, and it seems that subsection (d) embodies the broadest interpretation of those cases. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The courts which have so extended the law require an act outside the state, an injury within the state, and some additional contact with the state. *E.g., WSAZ, Inc. v. Lyons*, 254 F.2d 242 (6th Cir. 1958); *Huck v. Chicago, St. P. & O. Ry.*, 4 Wis. 2d 132, 90 N.W.2d 154 (1958). See comments by Professor G. W. Foster in WIS. STAT. ANN. tit. 25, § 262.05(4) (Supp. 1965).

his employer's, business.²⁶ This rationale applies equally to the requirement of "substantial revenue," for any revenue received directly from Louisiana would be credited to the independent contractor. Service upon the employer, therefore, would definitely violate due process, because he would have no contacts with the state.²⁷

In interpreting subsections (c) and (d), courts should also consider the intended meaning of the word "act" in order to determine the elements necessary to subject defendant to the jurisdiction of the Louisiana courts. Since a principal is liable for defamatory material written by him and published by an agent or independent contractor, Pearson could be liable for the publication in the instant case.²⁸ However, even though liability may be charged to Pearson, the only act that occurred in Louisiana would seem to be attributable to the syndicate or to the Louisiana newspapers. Defendant, having committed no act there, could not be served under subsection (c). It is true that his writing of the column in Washington, D.C., could be said to be an act outside the state under subsection (d), but that provision requires other contacts with the state that Pearson did not have, unless the relationship was one of principal-agent.

An additional barrier to jurisdiction under subsection (d) arises if Louisiana follows the single publication rule, by which all of the activities required for the original release of a libel to the public are classed as a single wrong, committed in the state where the first release occurred.²⁹ If we assume that the first release occurred in Louisiana, under this rule the only wrong in the instant case was committed in that state.³⁰ This interpretation would immediately exclude the possibility that defendant could be served under subsection (d), since that provision applies to acts outside the state.³¹ But, because this rule brings the act of writing the column in Washington, D.C., within the state, defendant

²⁶ It has been widely held that activity in the state by an independent contractor is not sufficient to sustain jurisdiction over the employer. *E.g.*, *Schmidt v. Esquire, Inc.*, 210 F.2d 908 (7th Cir.), *cert. denied*, 348 U.S. 819 (1954); *DeNucci v. Fleisher*, 225 F. Supp. 935 (D. Mass. 1964); *Morgan v. Heckle*, 171 F. Supp. 482 (E.D. Ill. 1959).

²⁷ See *Hanson v. Denckla*, 357 U.S. 235 (1958).

²⁸ See PROSSER, TORTS § 108, at 794 (3d ed. 1964).

²⁹ [T]he courts have developed a theory of a "single publication" as one composite tort which embraces all acts involved in the printing and distribution of a newspaper or magazine to its millions of readers in many jurisdictions. Under this rule there is but one "publication" and thus but one tort.

1 HARPER & JAMES, TORTS § 5.16, at 395 (1956).

³⁰ If, however, the first release was not in Louisiana, under the single-publication rule no cause of action would arise in that state. *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 632-34 (N.D. Ill.), *aff'd*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

³¹ *Cf. Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960). The court held that, since Illinois followed the single-publication rule, the only publication occurred at the place of original publication outside the state and hence was not an act within the state. In the district court opinion, 172 F. Supp. 615 (D. Ill. 1959), the court held that a nonresident author of books, which were sold to independent dealers in the forum state by the nonresident publisher, could not be subjected to jurisdiction under the Illinois statute. "Illinois law does not authorize this Court to assert in personam jurisdiction over a non-resident individual merely because a corporation by which he is employed, with which he contracts . . . is itself subject to such jurisdiction." *Id.* at 634.

might then be served under subsection (c). If Louisiana does not follow the single-publication rule, Pearson's act of writing the column would suffice as an act outside the state causing injury or damage to plaintiff within the state, but the requirements of additional contact under subsection (d) would still be lacking in an employer-independent contractor relationship. Even the Supreme Court's broadest decision — holding that a Texas insurance company, which mailed an offer to reinsure a California resident and which then received premiums from him, could be served in California — fails to extend service this far.³² In that case the activity in California was by defendant corporation, not by an independent contractor. To allow service on Pearson under these circumstances would violate due process of law, since he had no contacts with the state upon which jurisdiction could be based. To hold that activity by an independent contractor fulfills the requirements of minimum contact removes most of the restrictions on the extension of in personam jurisdiction.³³

The court's decision in the instant case, that defendant had sufficient contact with the state to allow service under the long-arm statute, is significant in the light of a recent decision in the Fifth Circuit Court construing a prior Louisiana long-arm statute.³⁴ In a defamation action, the court held that the activities of mailing newspapers into the state, and occasionally sending reporters there, did not satisfy the due process test of minimum contact.³⁵ A comparison of the contacts of defendant in that case with those of defendant in the instant case reveals substantially more contact in the first instance. While it is true that service was attempted under a different statute, those activities required to meet the due process test of minimum contacts remain the same. The holding of the instant case is thus contrary to precedent of the Fifth Circuit.

It is evident that some uncertainty exists concerning the proper construction of the Louisiana long-arm statute. To resolve such uncertainty, courts generally look to the purpose of the legislature. In this instance, the Louisiana Legislature, in enacting section 3201, was obviously attempting to broaden the scope of in personam jurisdiction over nonresidents. This extension is based on the policy that the state should provide a convenient forum for a litigant who was injured there by a nonresident.³⁶

³² *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The requisite contact in this case was furnished by a contract to reinsure between a Texas company and a California resident. This was the only contact that defendant had with the state but the Court held that the contract had connection with California substantial enough to permit jurisdiction under CAL. INS. CODE §§ 1610-1620. At least one court has distinguished *McGee* as an insurance case and refuses to apply it to other areas. *Trippe Mfg. Co. v. Spencer Gifts, Inc.*, 270 F.2d 821 (7th Cir. 1959). One writer takes issue with the result in *McGee* because the result would not promote fair play and substantial justice if the parties were reversed. Note, 37 IND. L.J. 333, 340-45 (1962).

³³ See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); note 6 *supra*.

³⁴ *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964).

³⁵ The court held that these activities constituted "at most a 'casual presence' in the State" which was not enough to make it reasonable and just and in conformity with due process to subject defendant to suit there. "[E]ven the broadest view of the principles of *International Shoe* and *McGee* will not bring these activities within the 'minimum contacts' rule." *Id.* at 475.

³⁶ See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). See generally Sobeloff, *Jurisdiction of State Courts Over Nonresidents in Our Federal System*, 43 CORNELL L.Q. 196 (1957).

There are, however, some countervailing policies which should be examined. If states are allowed to exercise such unlimited long-arm jurisdiction over authors, the possibility arises that a writer could be sued in each of the fifty states for publication of a libel, although he had little or no control over its circulation.³⁷ For this reason the New York Legislature has excepted interstate libel from those "tortious acts" for which plaintiff may make use of the long-arm statute.³⁸ Allowing such service is dangerous precedent and may lead to some restrictions upon freedom of the press, since a vindictive plaintiff could easily ruin an author by requiring him to defend suits in every jurisdiction. While it may be true that the state has an interest in providing a convenient forum for plaintiffs who are injured therein by nonresidents, the fact that plaintiff in the instant case had an adequate remedy against the local newspapers should have been taken into account. Extended service may be justified in products-liability cases, because in most of those instances the local wholesaler and retailer are not liable, and plaintiff would otherwise have no remedy within the forum.³⁹ In the instant case the local newspapers are jointly liable with defendant, and the plaintiff has a remedy within the forum. The only justification for long-arm service of process in interstate libel is convenience to the plaintiff. In promoting this end, however, the courts must find a balance between convenience to plaintiff and inconvenience to defendant. A proper application of the minimum-contacts test would seem to approach this goal.

D.R.M.

Vendor Required To Remit Sales Tax Notwithstanding Impossibility of Collection From Vendees Under Utah Law

Plaintiff, relying upon Utah State Tax Commission collection regulations, failed to collect, report, or remit sales tax on five- and ten-cent sales from his coin-operated vending machines. The tax commission found that under the applicable regulations these were taxable sales and assessed plaintiff the amount of the deficiency.¹ On appeal to the Utah Supreme Court, *held*, affirmed. Although the burden of Utah sales tax is intended to fall on consumers and should be collected from them by retailers, a tax on all sales must be remitted by the retailers, whether collected or not. *Robert H. Hinckley, Inc. v. State Tax Comm'n*, 404 P.2d 662 (Utah 1965).

In 1936, three years after the inception of sales tax in Utah, the state supreme court held that vendors must remit sales tax in spite of practical col-

³⁷ "It is an amazing and sobering thought that by the utterance of a single ill-considered word a man may today commit forty-nine separate torts, for each of which he may be severally liable, in as many jurisdictions . . ." Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953).

³⁸ N. Y. CIV. PRAC. LAW § 302(a)(2); McLAUGHLIN, STATE AND LOCAL BAR LECTURES ON THE CIVIL PRACTICE LAW AND RULES 11 (1963).

³⁹ 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 20, 22.02(2) (1964).

¹ This amounted to \$7,086.65. Brief for Defendant, p. 4.

lection problems.² During the next session of the legislature, the original statute, which had given vendors the option of either collecting from purchasers or paying the tax themselves, was amended to provide for mandatory collection.³ The state tax commission, recognizing the problem of collecting a tax in amounts under one cent,⁴ established the use of tokens in small denominations. The tokens, however, proved impractical, and in 1951 Utah adopted a bracket system⁵ similar to those used in other states.⁶

Retailers who deal primarily in goods priced within the lowest bracket cannot collect sufficient tax from consumers, but may be required, nevertheless, to remit a tax based on total sales. Although state statutes vary in the degree to which sales tax is legally imposed on vendors,⁷ most courts have sustained the tax and the bracket system over the objections of these retailers.⁸ The compounded difficulty of vending machine owners⁹ has been recognized in some states, where legislatures have exempted individual vending machine sales under specified amounts.¹⁰

In upholding the tax in the instant case the court followed the majority view, even though the Utah sales tax law was ambiguous and inconsistent. The statutes required the collection as well as the payment of a tax on *every*

² *W. F. Jensen Candy Co. v. State Tax Comm'n*, 90 Utah 359, 61 P.2d 629 (1936); *State Tax Comm'n v. City of Logan*, 88 Utah 406, 54 P.2d 1197 (1936).

³ The original language was, "The vendor may, if he sees fit, collect the tax from the vendee." Utah Laws 2d Spec. Sess. 1933, ch. 20, § 5, at 37. The 1937 amendment read, "The vendor shall collect the tax from the vendee." Utah Laws 1937, ch. 111, § 5, at 203. This wording remains unchanged. UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963). The probable motive for the change was unfair competition policy. See notes 31-34 *infra* and accompanying text.

⁴ See [1937-38] 4 UTAH TAX COMM'N BIENNIAL REP. 37.

⁵ The bracket system avoided collections involving fractions of one cent by incrementing the tax by one whole cent for each successive bracket. It overtaxed sales in the lower portion of each bracket, undertaxed sales in the upper portion of each bracket, and imposed no tax upon sales falling within the first bracket. The system as a whole was designed to approximate the required yield on aggregate sales.

⁶ Today, even though tokens or other devices are still authorized in some states, the bracket system is universally used. DUE, SALES TAXATION 303 (1957).

⁷ Of the 33 states using sales tax, 10 place the burden of the tax on vendors, 14 have both vendor and consumer features, and 8 place the burden on the consumers. In most cases the tax is assumed to be passed on to consumers regardless of the type of statute involved; however, the vendor's legal responsibility for the tax is more clear in vendor or "mixed" tax states. Utah is one of the consumer-levy states. DUE, STATE SALES TAX ADMINISTRATION 137-39 (1963).

⁸ *E.g.*, *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 123 S.E.2d 582 (1962) ("mixed" tax); *Smoky Mountain Canteen Co. v. Kizer*, 193 Tenn. 598, 247 S.W.2d 69 (1952) (vendor tax); *Calvert v. Canteen Co.*, 371 S.W.2d 556 (Tex. 1963) (vendee tax). *Contra*, *Winslow-Spacarb, Inc. v. Evatt*, 144 Ohio St. 471, 59 N.E.2d 924 (1945).

⁹ The peculiar problem of tax collection on vending machine sales is threefold: first, mechanical difficulties exist in actual collection; second, multiple-item purchases in amounts which would be taxable in over-the-counter business are sold as individual items; third, most sales are in amounts within the nontaxable brackets of state bracket systems.

¹⁰ For an enumeration of these states and a description of how some of them compensate for the exemption, see DUE, STATE SALES TAX ADMINISTRATION 152-53 (1963).

An example is Texas, where the 1963 legislature exempted vending machine sales under twenty-four cents, TEX. TAX-GEN. art. 24.04(T) (Supp. 1964), thereby overturning a decision of the same year that had required full tax payment on these sales. *Calvert v. Canteen Co.*, 371 S.W.2d 556 (Tex. 1963).

retail sale,¹¹ but the tax commission regulations provided for no tax on sales under fifteen cents¹² and made unlawful the practice of the vendor's absorbing the tax or including it in the purchase price.¹³ The vendor was therefore obligated under the statute to collect on every sale, but was required by regulation not to collect on sales within the first bracket. Since the vendor was required to remit three per cent of his receipts as sales tax,¹⁴ he was forced to absorb a tax thus made uncollectible, even though such absorption was illegal. This, argued the plaintiff, was a violation of equal protection and due process. The court rejected this contention by stating that the tax applies to all vendors and is not unlawful merely because no means of collection can be devised.¹⁵ The opinion then declared the regulations prohibiting absorption and the bracket regulation, insofar as it prevented collection on low-priced sales, to be beyond the tax commission's statutory authority. This finding was based on the statutory provision requiring the vendor's collection from vendees, which finding is inconsistent with the court's statements to the effect that collection is optional.¹⁶ The actual holding of the instant case on the issue of whether

¹¹ "[T]here is levied and there shall be collected and paid . . . a tax upon every retail sale of tangible personal property . . ." UTAH CODE ANN. § 59-15-4 (Supp. 1965). "[The vendor] shall be responsible for the collection of the amount of the tax imposed on said sale The vendor shall collect the tax from the vendee . . ." UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963).

¹² Utah State Tax Comm'n Reg. 6, CCH UTAH STATE TAX REP. ¶ 63-006, provided:

The following schedule is to be used in determining the amount to be collected for 3% state tax:

<i>Amount of Sale</i>	<i>Tax</i>
\$0.01 to \$0.14	None
.15 to .42	\$0.01

....

This regulation has since been amended. See note 27 *infra*.

¹³ Regulation 5 explicitly prohibited "absorption" during the period involved. This provision is now incorporated in regulation 4, which provides:

It is unlawful for the vendor in any way to waive the collection or imposition of the tax or to consider that the tax is included and collected as part of the sales price. The vendor must add the tax to the sales price as a separate item and collect from the vendee.

Utah State Tax Comm'n Reg. 4, CCH UTAH STATE TAX REP. ¶ 63-002. Regulation 74 provided that the total receipts from the operation of vending machines were to be considered as the total selling price of the goods sold through such machines. This had the effect of prohibiting inclusion of tax in the price, since it left no room for a tax to be added to the selling price and collected in the total receipts. Utah State Tax Comm'n Reg. 74, CCH UTAH STATE TAX REP. ¶ 60-122.

¹⁴ UTAH CODE ANN. § 59-15-4 (Supp. 1965). Additional local sales tax may increase the total rate to 3.5%.

¹⁵ Although the subject matter of the instant case concerned sales made through vending machines, the court may well have been influenced by the fact that the plaintiff corporation was also engaged in the sale of automobiles, parts, and accessories. The vending machine department of Robert H. Hinckley, Inc., was not a substantial part of the corporation's business. Record, p. 88. This put plaintiff in that large class of retailers for whom the bracket system was designed to produce overcollections on some sales to compensate for undercollections on others, making the small-sale problem less acute. This circumstance may serve to distinguish the instant case from subsequent cases involving retailers dealing exclusively in vending machine sales, where equal protection will be a greater issue.

¹⁶ The tax imposed is upon the transaction, and its payment to the State is not dependent upon whether it is collected or whether the consumer pays it. . . .

....

retailers must collect the tax from consumers is paradoxical and, hence, unclear.

The instant case raises three general problems: First, the vendor's duty was ambiguous prior to the decision and is even more ambiguous because of the decision. This involves questions of due process definiteness. Second, the court's validation of absorption may create unfair competition problems. Third, practical collection problems exist, particularly for retailers selling goods priced below fifteen cents.

Analysis of the law at the time plaintiff was preparing tax returns reveals that the conduct necessary to obey the law was not clearly ascertainable to him.¹⁷ In addition to the uncertain and confusing laws described above, Utah case law¹⁸ and the writings of economists¹⁹ agreed that the retailer was intended

Nor has our attention been called to any provision of our Sales Tax Act which makes it unlawful or prohibits a vendor from absorbing or paying the tax himself, if he so chooses.

Instant case at 666-67.

¹⁷ The "first essential" of due process of law is that statutes must contain reasonable certainty of meaning to provide intelligible standards for conduct and for adjudication. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). The extent to which this is required of taxation laws is not entirely clear. Criminal statutes must be more definite than civil statutes, *Winters v. New York*, 333 U.S. 507, 515 (1948), but the quasi-criminal nature of taxation enforcement sanctions has been thought by some to put tax collection laws in the criminal category. *E.g.*, *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252 (1947); 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6704 (3d ed. 1943). In addition, many state courts have declared that taxation laws must be unusually certain. *E.g.*, *Climate Control, Inc. v. Hill*, 86 Ariz. 180, 342 P.2d 854 (1959); *Commonwealth v. Jones*, 194 Va. 681, 74 S.E.2d 817 (1953); *City of Plymouth v. Elsner*, 135 N.W.2d 799 (Wis. 1965).

Another demand for clarity is made by the statutory-construction principle that doubts are to be resolved in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151 (1917). This presumption appears applicable to administrative regulations, *Randolph Foods v. State Tax Comm'n*, 137 N.W.2d 307, 309 (Iowa 1965), and it has been acknowledged as a construction maxim in recent Utah decisions. *E.g.*, *Ogden Union Ry. & Depot Co. v. State Tax Comm'n*, 16 Utah 2d 23, 395 P.2d 57 (1964) (dictum); *Pacific Intermountain Express Co. v. State Tax Comm'n*, 8 Utah 2d 144, 329 P.2d 650 (1958). The Utah court has also prescribed a definiteness test for noncriminal statutes which is similar to the Supreme Court's criminal statute test, that men of ordinary intelligence should be able to determine what conduct is necessary to obey the law. *Kent Club v. Toronto*, 6 Utah 2d 67, 72-73, 305 P.2d 870, 874 (1957).

¹⁸ Where a retailer had gone out of business after failing to collect a particular sales tax, the tax commission went to the purchaser rather than to the former retailer. *Ralph Child Const. Co. v. State Tax Comm'n*, 12 Utah 2d 53, 362 P.2d 422 (1961). "The sales tax in this state is a tax on the 'consumer.'" *E. C. Olsen Co. v. State Tax Comm'n*, 109 Utah 563, 568, 168 P.2d 324, 326 (1946). "[T]he vendor's status, under the act, is that of a collector rather than that of a taxpayer . . ." *Bird & Jex Co. v. Anderson Motor Co.*, 92 Utah 493, 498, 69 P.2d 511, 512-13 (1937).

¹⁹ "[T]he substance of consumption taxes . . . consists not so much in the fact that these taxes are in the final analysis borne by the consumer, as in the fact that they are *intended* to be borne by them.

....

[T]hey are levied on individuals as consumers rather than as producers, property owners, or simply recipients of incomes, and are adjusted to their consumption habits

Studenski, *Characteristics, Developments and Present Status of Consumption Taxes*, 8 LAW & CONTEMP. PROB. 417-19 (1941). (Emphasis in original.)

Statistical tables list Utah as a "vendee tax" state where sales tax is legally imposed on consumers rather than retailers. DUE, STATE SALES TAX ADMINISTRATION 137 (1963); OSTER, STATE RETAIL SALES TAXATION 95 (1957).

The tax commission acknowledged that the vendor was a collector "acting in the capacity of an agent of the state" as early as 1937. [1937-38] 4 UTAH TAX COMM'N

to be the collector of a tax paid by consumers. Although some Utah cases had held that a vendor can be required to pay the tax if he fails to perform his statutory duty of collection,²⁰ it appeared unlikely at the time plaintiff was reading the law that these cases also applied to situations where collection was legally impossible.²¹ From the standpoint of economic theory, the Utah statutes created a vendee retail sales tax rather than a vendor gross-receipts tax;²² but by requiring a remittance based upon aggregate sales while not providing for sufficient collections, the state had been enforcing what was in effect a gross-receipts tax. Thus, it was unclear whether the legal burden of the tax was on vendors or vendees. Because of these inconsistencies, the instant court might have found the situation contrary to due process principles of definiteness and fair warning.²³ However, its decision substantiates the observation²⁴ that the

BIENNIAL REP. 37. And in a special ruling on the Utah Sales Tax Act, the Bureau of Internal Revenue made sales tax deductible by the vendee for federal income tax purposes. Liability for actual payment was expressly found to be imposed on the vendee with the vendor acting as collector for the state. I.T. 2917, XIV-2 CUM. BULL. 83 (1934).

²⁰ E.g., *Dupler's Art Furs, Inc. v. State Tax Comm'n*, 108 Utah 513, 161 P.2d 788 (1945); *State Tax Comm'n v. Spanish Fork*, 99 Utah 177, 100 P.2d 575 (1940).

²¹ The case of *W. F. Jensen Candy Co. v. State Tax Comm'n*, 90 Utah 359, 61 P.2d 629 (1936), cited as authority by the court in the instant case, dealt with *practical* impossibility of collection, and was decided before the mandatory-shifting provision requiring collection from vendees was in effect. In that case the vendor maintained that the statute prohibiting the collection of amounts under one cent as sales tax, and the lack of coins in denominations smaller than one cent, made collection of a 2% tax impossible on sales under fifty cents. The court held that since tokens, a bracket system, or some other device could have been employed and since collection by the vendor was optional, the problem was practical and did not affect the legality of the tax. The use of tokens followed this decision, perhaps as a partial result of it. The instant case is distinguishable because of changes in the law making collection mandatory and yet *legally* impossible. One commentator found the *Jensen* case "particularly interesting in view of the frequent provisions of statutes that a retailer is required to collect the tax from consumers. . . . The Utah results are not necessary if the state otherwise construes its statutes." Northrup, *The Measure of Sales Taxes*, 9 VAND. L. REV. 237, 249 (1956).

²² "As the law now stands it would seem to be definitely a consumer's tax rather than a retailer's occupational tax." Editor's comment, CCH UTAH STATE TAX REP. ¶ 60-005. The relevant distinction between the two types of taxes is the ultimate legal responsibility for payment. See DUE, SALES TAXATION 4 (1957).

²³ One possible limitation on unconstitutional uncertainty in the instant case is the court's finding the bracket regulation beyond the scope of the commission's statutory authority. Largely because of his reliance on that regulation, plaintiff understood that no tax was due. It is one of the uncomfortable realities of the law that reliance on statutes or regulations later declared invalid may be at the citizen's peril. *Utah Hotel Co. v. Industrial Comm'n*, 107 Utah 24, 151 P.2d 467 (1944). See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146-49 (1921); COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* 284-86 (1951). If the court's finding in the instant case is therefore retroactive, it is as though there had been no bracket regulation to make the law confusing. Since the court did not articulate the extent or the effect of its findings, however, it is unclear whether the decision is in this sense retroactive.

In any event, the reasons for requiring fair warning are applicable to the instant case, since the tax was not legally imposed on the plaintiff and since he might have provided a means of collection had his duty been made clear. Professor Due argues convincingly that, because of the importance of cooperation on the part of retailers for the successful operation of sales taxation, "Educational work with them is much more effective than criminal prosecution." Therefore, clear collection regulations are listed as essential to workable tax administration. DUE, SALES TAXATION 384 (1957).

²⁴ See, e.g., Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 78 (1948); Note, *License Revocation — Uncertainty and Due Process*, 15 HASTINGS L.J. 339 (1964).

definiteness actually required does not correspond to much-quoted standards.²⁵

As a result of the instant case, there are ambiguities which make Utah sales tax law even less intelligible. One problem is created by the court's statement that payment of the tax by vendors does not depend on whether it is collected from vendees.²⁶ This has the effect of imposing the tax directly on a retailer, not as a penalty for failure to perform the collection function, but as the only means by which noncollectible sales tax can be paid to the state. The court's rationale in so holding was that the tax is levied on the transaction and not on either the vendee or the vendor. This reasoning conflicts with the statute that makes collection mandatory, and creates uncertainty regarding the ultimate legal responsibility for payment. In addition, the court stated that the bracket system should not be the exclusive method of collection and that it may not apply if it interferes with adequate collection from consumers. As a result, the tax commission has promulgated an amended bracket regulation that makes use of the system optional.²⁷ It is still unclear, however, whether the tax commission or the vendors individually are to initiate a more workable collection method. The court said that vendors should not be precluded from using some means other than the bracket system, but the statutes make it clear that the tax commission is to prescribe such procedures, presumably for the sake of uniformity and efficiency.²⁸ An important question left largely unanswered by the court or by the amended bracket regulation is what alternative collection methods might be available. This doubtful state of the law falls short of reasonable certainty, but it evidently meets actual due process standards. As a practical matter, however, clarification of the law would be very desirable for administrators as well as for taxpayers.

²⁵ To contend that taxation laws are, in fact, required to be clear would be rather naïve. One need only page through modern federal income tax regulations to see why the reasonable businessman needs a tax advisor. This increasing complexity has influenced the courts to leave confusing tax questions, formerly subject to judicial due process definiteness tests, to the judgment of expert administrators. COOPER, *op. cit. supra* note 23, at 301-02.

Furthermore, the rule favoring taxpayers in doubtful cases has not been recognized by the Supreme Court since 1938, when the Court stated that it was not impressed by the argument that all doubts should be resolved in favor of the taxpayer. *White v. United States*, 305 U.S. 281 (1938). The leading case, *Gould v. Gould*, 245 U.S. 151 (1917), was not expressly overruled but it has not been cited by the Court since the *White* case. For evaluations of the change, see Note, 42 CORNELL L.Q. 589 (1957) and Note, 56 HARV. L. REV. 1142 (1943). The *Gould* rule nevertheless continues to be approved in federal courts, *e.g.*, *Delk Inv. Corp. v. United States*, 228 F. Supp. 545 (E.D. Mo. 1964) (dictum); *Circle Discount Corp. v. United States*, 211 F. Supp. 743 (D.D.C. 1962) (dictum), in state courts, *e.g.*, *Charles W. Sexton Co. v. Hatfield*, 263 Minn. 187, 116 N.W.2d 574 (1962); *Ogden Union Ry. & Depot Co. v. State Tax Comm'n*, 16 Utah 2d 23, 395 P.2d 57 (1964) (dictum), and in treatises on statutory construction. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 257 (1940); 3 SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 6701 (3d ed. 1943).

²⁶ Note 16 *supra*.

²⁷ Those still desiring to use the bracket system are instructed by the new regulation that they should not collect tax on sales under fifteen cents. Utah State Tax Comm'n Reg. S6, CCH UTAH STATE TAX REP. ¶ 63-006.

²⁸ For the purpose of more efficiently securing the payment, collection and accounting for the taxes provided for under this act, the tax commission in its discretion, by proper rules and regulations, shall provide for the issuance of tokens or other appropriate devices to facilitate collections . . .

UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963).

The instant court suggested one means of collection which, because of its potential effect on unfair competition, may produce results never anticipated by the court. In order to enable collections of sales tax in amounts under one cent, the court struck down the regulations that prevented absorption or any inclusion of tax in the price.²⁹ As explained by the court, if vendors would lower the actual selling price of a ten-cent item, for example, to 9.7 cents, the ten cents paid by the purchaser would include a .3-cent sales tax. This would facilitate collections on sales in the first bracket. The method may or may not be practical for vending machines, depending on whether vending machine retailers can make quantity or quality adjustments sufficient to ensure a profit while selling at slightly lower prices. Aside from the merits of this method,³⁰ it was not necessary in suggesting it to invalidate the regulations prohibiting absorption. Mere inclusion of sales tax in the purchase price is not "absorption" as that term is used in taxation.³¹ True absorption occurs when a retailer bears the tax without passing it on to consumers in any way. The practice intended to be prevented by prohibitions against absorption and by mandatory-collection provisions may be illustrated as follows: Suppose that a merchant's "cost" on an item is 200 dollars. The Utah Unfair Practices Act, designed to protect small retailers,³² prohibits sales at prices below "cost" as defined by the statute.³³ The sales tax on a transaction involving the sale of this item at

²⁹ Reference was made by the court to regulation 5, which had been in effect during the period involved in the instant case. Between the time the case arose and the date of the decision, however, regulation 5 was deleted from the regulations and its provisions were incorporated in regulation 4 without express use of the word "absorption." Hence regulation 4 is presumably within the finding of the court. It is not clear why the opinion made no reference to regulation 4, unless the court was not aware of the change. For the language of regulation 4, see note 13 *supra*.

³⁰ A problem raised by the validation of inclusion of tax in the sale price is the conceivable practice of tax avoidance. Under the statute allowing collections in excess of 3%, so long as not in excess of one cent, UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963), a retailer could collect a one-cent tax on sales where ten cents is paid by the purchaser. Since present remittance procedures require a payment of tax on total sales without precise accounting of collection, the retailer could figure total gross sales based on nine-cent prices, remit 3% of that total, and keep the remainder of what was collected. This practice would be unlawful under the statute requiring the remittance of excess collections, UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963), but because of enforcement difficulties it remains a possibility.

³¹ See DUE, STATE SALES TAX ADMINISTRATION 139-41 (1963); DUE, SALES TAXATION 16-17 (1957); OSTER, STATE RETAIL SALES TAXATION 47-54 (1957). The term is used in a typical state statute prohibiting absorption as follows:

It is unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the sales price of the property sold or that, if added, it or any part thereof will be refunded.

CAL. REV. & TAX. CODE § 6053. Most states using sales tax have such provisions for the purpose of requiring uniform shifting of the incidence of the tax to consumers. DUE, SALES TAXATION 302 (1957).

³² This policy motivated similar statutes in most states. See OPPENHEIM, UNFAIR TRADE PRACTICES 947-53 (1950).

³³ The statute prohibits the advertising, offer to sell, or sale of any merchandise at less than cost as defined by the terms of the act. UTAH CODE ANN. § 13-5-7 (Supp. 1965). For general evaluations of sales-below-cost statutes, including analyses of their economic desirability, constitutionality, and enforcement problems, see Note, *Antitrust and Unfair Trade Practice Regulation in Utah*, 8 UTAH L. REV. 339 (1964); Note, *Sales Below Cost Prohibitions — Private Price Fixing Under State Law*, 57 YALE L.J. 391 (1948).

that "cost" would be 6 dollars, thus setting the price below which a seller would be losing money at 206 dollars. If a designing retailer now charges 200 dollars and advertises that he will bear the sales tax, he is not technically in violation of the unfair competition statute, but accomplishes the very mischief intended to be made unlawful.³⁴ Thus, by sanctioning this heretofore illegal practice, the court in the instant case unnecessarily and perhaps unwittingly opened the door for unfair competition problems. Utah still has the statute³⁵ requiring collection from vendees, which would appear to prohibit absorption; however, the instant court has cast some doubts on the validity of this provision. It may yet be possible to limit lawful absorption to small sales, require posted prices to indicate that part of the price is for sales tax, or otherwise avoid the danger discussed.

The collection of sales tax on low-priced sales is a key problem presented by the instant case. One judicial solution to this problem was offered by the Ohio court,³⁶ which was also faced with a conflict between a statute requiring a tax on all sales and a statutory bracket system which exempted sales under minimum amounts. In that case the court held that the vendor's gross of minimum-priced sales was not taxable, because the tax on *all* sales was interpreted to ensure generally the receipt of tax under the bracket system and not to impose a separate tax. The simplest solution in the instant case would have been a ruling that, since the statute made collection mandatory, the regulation creating the bracket system was beyond its statutory authority because it inhibited collection and was thus void *ab initio*. This holding would have placed full responsibility for solving the collection problem on the tax commission, thereby avoiding the difficulties caused by the court's discussion of collection methods.³⁷

Legislative and administrative adjustments are necessary to resolve permanently the issues of payment and collection. A fundamental difficulty is created

³⁴ Even when sales below cost were not expressly involved, failure to collect sales tax has been found to create unfair competition. *E.g.*, *Doby v. State Tax Comm'n*, 234 Ala. 25, 174 So. 233 (1937); *Pacific Coast Eng'r Co. v. State*, 111 Cal. App. 2d 31, 244 P.2d 21 (Dist. Ct. App. 1952) (dictum). The dissenting opinion in a Utah case observed this effect and the related problem of price discrimination between customers when tax collection is optional. *Dupler's Art Furs, Inc. v. State Tax Comm'n*, 108 Utah 513, 521, 161 P.2d 788, 791 (1945) (dissent). These fears have been expressed by retailers since the inception of sales tax in the United States. *DUE, SALES TAXATION* 302-03 (1957); *accord*, Shoup & Haimoff, *The Sales Tax*, 34 COLUM. L. REV. 809, 829-30 (1934).

³⁵ UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963).

³⁶ *Winslow-Spacarb, Inc. v. Evatt*, 144 Ohio St. 471, 59 N.E.2d 924 (1945).

³⁷ An argument against judicial attempts to solve complex tax administration problems was made by Justice Wolfe:

The [tax] commission has the duty of executing and administering the law. The practical difficulties in accomplishing that should be recognized by the courts. The court, sitting purely in an atmosphere of abstract argument and reasoning without recognizing the realities of the situation under which the commission works, might adhere to a strictly logical construction of the provisions of an act which would make it entirely unworkable.

Western Leather & Finding Co. v. State Tax Comm'n, 87 Utah 227, 236-37, 48 P.2d 526, 529-30 (1935) (concurring opinion). The instant case is an illustration of this danger. For a discussion of the reasons why courts should leave taxation policies and resulting legislation to administrative and legislative bodies, see Miller, *Federal Courts as Makers of Income Tax Law*, 6 TAX L. REV. 151 (1951).

by a conflict between two policies inherent in the law. One policy is the desire to prevent unfair competition, which led to the mandatory-collection provision in the statute and to the regulations prohibiting absorption. The other policy is the desire to enforce the payment of sales tax revenue to the state, which led to a tax on all sales and to provisions making the vendor a guarantor of collection and payment, with criminal sanctions for failure to collect.³⁸ These two policies conflict in cases where no collection is possible, since one policy must be violated to enforce the other. A resolution of this problem will hopefully lead to answers to other questions raised by the instant case: Who should have legal responsibility for payment?³⁹ Should special treatment be given vending machine operators?⁴⁰ Which collection methods are practicable?

Until these and other fundamental questions are answered by the legislature, the immediate collection problem must be approached according to the existing statutory structure, which emphasizes payment by vendees. Based on this premise, the bracket system should probably remain functional, although some supplementation may be required. It is significant that the system's theoretical structure is designed to compensate for undercollections throughout the state. Ideally, retailers should be required to remit only what is collected from consumers, with the averaging effect of the brackets producing the required statewide yield. Remittance of excess collections is difficult to enforce, however, and in many cases the cost of accounting for separate tax collections may be a greater financial burden than the cost of bearing what may yet be due after bracket system collections.⁴¹ Nevertheless, those merchants who must pay significantly more than they can collect would perhaps benefit from a regulation allowing all vendors the option of either accounting for and remitting the actual amount collected, or of merely remitting an amount slightly over the percentage required. Since this dual procedure may

³⁸ UTAH CODE ANN. §§ 59-15-8 to -9 (Repl. vol. 1963); Utah State Tax Comm'n Reg. 4, CCH UTAH STATE TAX REP. ¶ 63-002.

³⁹ [O]ne question which needs to be decided at the outset is whether the real taxpayer is the vendor or the purchaser.

....

It is evident that the incidence of the tax is basic to the question of the state's authority to collect from the vendor and vendee.

Hartman, Henry, & Foster, *Sales Taxation Collection Problems*, 9 VAND. L. REV. 316, 336-38 (1956).

After a discussion of vendor, vendee, and hybrid types of sales taxes, a leading authority suggests that there are advantages to placing the full legal liability on the vendor. One of these is that responsibility for payment is clear cut and undivided. DUE, STATE SALES TAX ADMINISTRATION 139 (1963).

⁴⁰ At the tax commission's hearing of the instant case, plaintiff offered to prove that the vending machine business yields a "low average margin of profit of about 2.5%." Brief for Plaintiff, p. 10. If this is even a reasonable estimate, the effect of the instant case could be very harsh for machine vendors who cannot devise a means of collection. This specific problem may warrant consideration of a special exemption similar to those granted in several other states. See note 10 *supra*.

⁴¹ At present in Utah, most retailers do not make a separate accounting of sales tax collected; rather, they merely remit 3% of their gross sales as state sales tax. This may be one reason why it is difficult to enforce excess collections. Few excesses are reported to the state tax commission, even though they should be remitted according to UTAH CODE ANN. § 59-15-5 (Repl. vol. 1963). Interview with Paul Holt, Director of Auditing Division, Utah State Tax Commission, in Salt Lake City, Utah, Sept. 12, 1965.

be impractical, another alternative is to impose a special retailers' privilege tax on total sales in the lowest bracket while exempting these sales from regular sales tax.⁴²

The instant case reveals that: first, although the legal position of vendors remains undefined, the Utah court apparently does not require that the law be as unambiguous as theoretical principles of due process would require; second, legal absorption of sales tax should be limited or prohibited if practical experience substantiates the fear of unfair competition; third, new regulations or even new legislation is needed to prescribe workable collection methods and to redefine the vendor's role in sales taxation. Utah sales tax administration could thus be improved by solving the problems presented by the instant case.

B.C.H.

Article 28 of the Warsaw Convention Construed To Have No Effect on Availability of Forums Within the United States

Plaintiff brought a wrongful death action pursuant to the provisions of the Warsaw Convention, a treaty governing actions arising out of accidents in international air transportation.¹ Defendant moved to dismiss on the ground that, since the District Court for the Southern District of New York did not qualify as one of the courts enumerated in article 28 of the convention, it had no jurisdiction over the subject matter of the action. The trial court denied defendant's motion,² and on appeal the Court of Appeals for the Second Circuit *held*, affirmed. Article 28 of the convention dictates the country in which an action must be brought and not a particular court within a country. *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 86 Sup. Ct. 38 (1965).

In 1929, when the Warsaw Convention was drafted, the major problem facing the air carrier industry was securing capital to finance development and expansion. Since the judgments resulting from one air disaster might dissipate a company's entire capital investment,³ it was essential that a way be found to

⁴² Wyoming supplements the bracket system with both methods suggested. Vendors must bear a 1% tax on sales under twenty-four cents, so long as they keep detailed and segregated records. If they choose not to keep records, they may pay a 2% tax which is equal to that state's regular sales tax rate. WYO. STAT. ANN. § 39-291(e) (1957). Hence, "total taxable sales" for remittance purposes exclude sales under twenty-four cents. *Walgreen Co. v. State Bd. of Equalization*, 62 Wyo. 288, 166 P.2d 960 (1946).

¹ "[I]nternational transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another power, even though that power is not a party to this convention.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 1, 49 Stat. 3001, T.S. No. 876 [hereinafter cited as *Warsaw Convention*].

² *Mertens v. Flying Tiger Line, Inc.*, 35 F.R.D. 196 (S.D.N.Y. 1963).

³ 1 KREINDLER, AVIATION ACCIDENT LAW § 11.01[2] (1963); Karlin, *Warsaw, Hague, the 88th Congress and Limited Damages in International Air Crashes*, 12 DE PAUL L.

reduce the uncertainty in financing the infant industry. To accomplish this purpose the drafters sought to unify the law applicable to international carriages. The most important provision in this regard is the limitation of liability for injury and death of passengers.⁴ Other provisions in the treaty establish the standard of care required of the carrier,⁵ allow the defense of contributory negligence,⁶ and shift the burden of proof from the plaintiff to the carrier.⁷ The venue section, article 28, provides in part:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.⁸

While several of these provisions benefit the plaintiff, most writers agree that the convention is a protective measure that was adhered to by the United States for the purpose of aiding the development of its international carriers.⁹

The protective purpose of the convention appears to have been accorded substantial weight in the earlier decisions dealing with article 28. The courts, construing article 28 in favor of the carriers, applied it as a special procedural statute of the United States to limit the number of judicial districts in which the action could be brought. In this application of article 28, the courts split on the question of whether article 28 affected the subject matter jurisdiction of the court or was merely a special venue requirement.¹⁰ The most recent decisions, however, advance a concept of "international venue" with the nation-

REV. 59, 60-61 (1962); Lissitzyn, *The Warsaw Convention Today*, 56 PROC. AM. SOC'Y INT'L L. 115, 116 (1962).

⁴ 1 KREINDLER, *op. cit. supra* note 3, § 11.01[2]; Letter From Secretary of State, Cordell Hull, to Franklin D. Roosevelt, March 31, 1934, in HOTCHKISS, *THE LAW OF AVIATION* 144, 146 (2d ed. 1938); Metzger, *Limitation of Liability for Aircraft Accidents in International Transportation — The Warsaw Convention and The Hague Protocol*, 56 PROC. AM. SOC'Y INT'L L. 128, 129 (1962). While thirteen states have enacted wrongful death statutes which impose limitations on damages recoverable for wrongful death, the lowest limitation is \$20,000. No state limits damages for personal injury. 1 KREINDLER, *op. cit. supra* note 3, § 11.01[4].

⁵ Warsaw Convention art. 20.

⁶ *Id.* art. 21.

⁷ *Id.* art. 17.

⁸ *Id.* art. 28, para. 1.

⁹ 1 KREINDLER, *op. cit. supra* note 3, § 11.01[2]; Karlin, *supra* note 3, at 60-61; Lissitzyn, *supra* note 3, at 116; Metzger, *supra* note 4, at 130.

¹⁰ Those cases in which article 28 has been referred to as affecting the jurisdiction of the court are the following: *Nudo v. Societe Anonyme Belge d'Exploitation de la Navigation Aeriennne Sabena Belgian World Airlines*, 207 F. Supp. 191 (E.D. Pa. 1962); *Winsor v. United Air Lines, Inc.*, 153 F. Supp. 244 (E.D.N.Y. 1957); *Berner v. United Airlines, Inc.*, 3 App. Div. 2d 9, 157 N.Y.S.2d 884 (1956), *aff'd*, 3 N.Y.2d 1003, 147 N.E.2d 732, 170 N.Y.S.2d 340 (1957); *Galli v. Re-Al Brazilian Int'l Airlines*, 29 Misc. 2d 499, 211 N.Y.S.2d 208 (Sup. Ct. 1961); *In re Waldrep's Estate*, 49 Wash. 2d 711, 306 P.2d 213 (1957). Those cases in which article 28 has been regarded as a venue requirement are the following: *Eck v. United Arab Airlines, S.A.A.*, 241 F. Supp. 804 (S.D.N.Y. 1964); *Spencer v. Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S.D.N.Y. 1962); *Mason v. British Overseas Airways Corp.*, 5 Av. Cas. 17121 (S.D.N.Y. 1956); *Scarf v. Trans World Airlines, Inc.*, 4 Av. Cas. 17795 (S.D.N.Y. 1955); *Dunning v. Pan Am. World Airways, Inc.*, 4 Av. Cas. 17394 (D.D.C. 1954); *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).

state, rather than the judicial district, as the basic unit,¹¹ and thereby expand the number of potential forums. This construction precludes article 28 from having any procedural effect within the nation-state and, thus, makes the former jurisdiction-venue question moot.¹²

The court in the instant case read the language of article 28 quite differently from most of the lower courts of the Second Circuit.¹³ It adopted the "international venue" concept, reasoning that since the basic unit of international law was the nation-state, it could be assumed, unless a contrary intent appeared, that article 28 was written with reference to nation-states, not to areas and subdivisions therein.¹⁴ The court then concluded that a contrary intent was not indicated in either the minutes of the convention or the proceedings in the Senate upon ratification.¹⁵

The court, in its interpretation, declined to give substantial weight to several settled principles of treaty construction. The United States Supreme Court has directed that a treaty should be construed to effectuate its purpose¹⁶ and in the light of circumstances existent at the time of adherence.¹⁷ The purpose of the Warsaw Convention was to protect the then-infant air carrier industry. It would seem consistent with this purpose to provide that actions controlled by the convention could be brought only before particular courts within the national boundary of an adhering country.¹⁸ This provision would give the carriers the privilege of defending, in a minimum number of different courts, the many actions likely to arise out of an air catastrophe. Moreover, limiting the number of courts where an action could be brought would facilitate uniformity of interpretation which would be necessary to stabilize the financial risk and, thus, stimulate capital investment in the international air

¹¹ See *Pardonnet v. Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N.D. Ill. 1964); *Pitman v. Pan Am. World Airways, Inc.*, 223 F. Supp. 887 (E.D. Pa. 1963).

¹² But it should be noted that this interpretation does not render article 28 ineffectual in all cases. The instant court specifically reserved the question "whether a defendant would be entitled to a dismissal for lack of subject matter jurisdiction . . . if the United States is not one of four enumerated 'places' or [*sic*] Article 28(1)" Instant case at 856. See discussion in *McKenry, Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 225-26 & n.68 (1963).

¹³ However, we read Article 28(1) quite differently. The "places" specified refer to the High Contracting Parties, not to areas within a particular High Contracting Party. An action may be brought, at the option of the plaintiff, in the territory of a High Contracting Party, if the domicile of the carrier . . . is within that country.

Instant case at 855.

¹⁴ *Ibid.* No authority was cited for this rule of treaty construction. It is difficult to assess the validity or the helpfulness of such an assumption, given the diverse subject matter of treaties. Compare *Convention With Great Britain for the Protection of Migratory Birds*, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628, with *Treaty of Peace With Italy*, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648.

¹⁵ Instant case at 855.

¹⁶ *E.g.*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *In re Ross*, 140 U.S. 453, 475 (1891).

¹⁷ *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912).

¹⁸ Statutes providing that a particular type of action must be brought in a specific forum are not uncommon. See 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* §§ 77-78, 81-85 (Wright ed. 1960).

carrier industry. Since the minutes of the convention and the foreign judicial decisions interpreting the treaty are specialized and, for the most part, untranslated,¹⁹ it would seem advisable to limit, so far as possible, the number of courts interpreting the treaty.²⁰

The instant court's interpretation also violates the clear language of the treaty and deprives the words "before the court" of any meaning.²¹ Article 28 does not refer to "places," or to "areas and subdivisions," or to "countries," as the instant court implies;²² its referent is specific: "An action for damages must be brought . . . in the territory of one of the High Contracting Parties . . . *before the court* of the domicile of the carrier . . ."²³ It appears that this language, read in the context of the other provisions and in the light of the

¹⁹ Since the United States did not participate in the drafting of the convention, there is no report which evaluates the discussions of the drafters in terms of the interests of the United States. The minutes are in French and have been translated only piecemeal by certain authors to support contentions made in articles. See Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217 (1959). Accordingly, the courts have long been plagued by difficulties in translating certain phrases in the treaty. See *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 219 F. Supp. 289, 317-26 (S.D.N.Y. 1963), *rev'd*, 346 F.2d 532 (2d Cir. 1965). Since it is essential that the treaty be uniformly construed in all adhering nations, the case law of foreign nations would also have to be examined. The convention has assumed a specialized character because it was drafted almost exclusively by civil law lawyers. Therefore, the influence of the civil law is pervasive. For example, it has been argued that the convention was intended to establish a contractual right of recovery for wrongful death. Calkins, *supra*.

²⁰ See generally Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549 (1935); Wright, *The Interpretation of Treaties*, 23 AM. J. INT'L L. 94 (1929).

²¹ The courts are in agreement that a treaty provision should be construed to give effect to all of its language, if this can be done without violating the plainly disclosed intent. *Miami Tribe v. United States*, 281 F.2d 202, 210 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961); *accord, In re Ross*, 140 U.S. 453, 475 (1891); *Geofroy v. Riggs*, 133 U.S. 258, 270 (1890); *cf. McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

In a recent case the New York Court of Appeals interpreted the clause in article 28 which provides that an action may be brought "where he [the carrier] has a place of business through which the contract has been made." In a concurring opinion Chief Judge Desmond, objecting to the technique of construction used by the majority, stated:

The majority's construction or application of "where he has a place of business" in article 28 of the Warsaw Convention deprives of all meaning the inseparable other words of that same phrase, to wit, the words "through which the contract has been made." *Such a major excision is unauthorized.*

Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 63, 203 N.E.2d 640, 644, 255 N.Y.S.2d 249, 254-55 (1964). (Emphasis added.)

²² Instant case at 855.

²³ In *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964), Judge Bergen, dissenting from the majority's liberal construction of article 28, said:

The ratification of the Warsaw Convention by any of its high contracting parties necessarily took into account the domestic court system of each signatory when it came to providing for jurisdiction over actions arising in pursuance of the Convention. . . .

Article 28 prescribes that an action may be brought "in the territory of one of the High Contracting Parties." But that clause does not authorize actions in any court within that territory. *Jurisdiction is expressly limited to a specified court.* An action must be brought in "the court . . . where he [the carrier] has a place of business through which the contract has been made."

Id. at 63, 203 N.E.2d at 644, 255 N.Y.S.2d at 255. (Emphasis added.)

circumstances surrounding the drafting, indicates an intent to affect the availability of forums within the United States.²⁴

The instant court finds support for its interpretation in the Senate ratification proceedings and in the minutes of the convention.²⁵ However, the Senate proceedings, consisting of no more than a formal reading and approval of the treaty, disclose no debate on its merits.²⁶ Therefore, it would seem that no tenable inference can be drawn from this source concerning the understanding of the Senate.²⁷ Likewise, the minutes of the convention do not lend support to the court's interpretation. Not only is there no discussion bearing on the question, but the drafters' usage of "court" and "country" is precisely the same in the minutes as in article 28.²⁸ After reading the minutes alluded to by the court, and, assuming that the court's construction of the language is correct, it is difficult to understand why the delegates used "tribunal," "court," and "point of departure" in the same sentence with "country" and "national territory" when referring to the places where actions must be brought if, in fact, they did not intend that article 28 should transcend national boundaries and have effect on specific forums.²⁹

²⁴ The Warsaw Convention establishes a uniform code of law which controls most aspects of international carriage by air. For example, it prescribes the form and content of transportation documents (such as tickets, baggage checks, and air waybills), provides limitations of liability, and raises a presumption of negligence on the part of the carrier. It also establishes a time limitation for the bringing of an action under the convention. It seems clear that the convention was intended to be the ultimate embodiment of the law to which the courts of adhering nations would look when entertaining litigation arising out of accidents in international transportation by air. See Calkins, *supra* note 19, at 231. The specificity of these provisions seems to suggest that article 28 was intended to affect specific forums.

²⁵ Instant case at 855.

²⁶ 78 CONG. REC. 11577 (1934).

²⁷ It is possible to infer, however, that the Senate was aware that the convention made some change in internal procedure since it was pointed out in the report of the Secretary of State, which accompanied the treaty to the Senate, that there would be "departures from accepted procedure in this country." Letter From Secretary of State, Cordell Hull, to Franklin D. Roosevelt, March 31, 1934, in HOTCHKISS, *THE LAW OF AVIATION* 144, 146 (2d ed. 1938).

²⁸ Minutes of II Conference Internationale de Droit Prive Aerien, Oct. 4-12, 1929, I.C.A.O. Doc. No. 7838, pp. 77-78, as translated, in part, in Calkins, *supra* note 19, at 229. The discussion referred to by the instant court centered on the issue of whether a plaintiff should be allowed to bring suit at the place of the accident. *Ibid.* The following remarks seem to justify the inference that the delegates intended article 28 to take effect with reference to particular courts, not merely to countries:

It is difficult not to accept jurisdiction of the place of the accident. The person suffering damage, as well as the carrier himself, has a very special interest in having easy proof, and certainly proof cannot be easier than on the very spot where the accident occurred.

....

In this same [Article 28] . . . there is listed the place of destination as a jurisdiction in which the injured person may bring said recourse; but the place of destination can also be *in Mesopotamia* — a country where the courts don't work very well

Id. at 230 (Mr. Youpis — Greece). (Emphasis added.) "[T]here is no reason at all for that person to go trying his case before any old court which happens, by chance, to be the court of the place of accident." *Id.* at 230 (Mr. Ripert — France).

²⁹ See *id.* at 229-30. When applied to the council of legal experts responsible for the drafting of the Warsaw Convention, the policy behind the following statement of the United States Supreme Court seems especially germane: "[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent

It appears that the instant court has construed the treaty without substantial regard for its purpose and without according appreciable weight to the clear import of the language. It cannot be doubted, however, that the court's action was grounded upon valid, albeit discordant, considerations. In an action under the convention the plaintiff is suing with the burden of an 8,300-dollar limitation which is imposed by a law that embodies a principle — the limitation of a public carrier's liability — which is repugnant to national public policy.³⁰ On the other hand, defendant, usually affluent and often the agent of a foreign nation, is allowed, under the prior interpretation of article 28, to restrict plaintiff's choice of forum to only four courts in the world, none of which would necessarily be in the nation of plaintiff's domicile.³¹ It would seem that basic principles of justice alone would supply a forcible argument to plaintiff. However, it should also be considered that the drafting of the convention started in 1926, before the historic flight of Charles Lindbergh,³² and that in 1934, when the United States adhered to the convention, America's only international air travel consisted of flights from Florida to Cuba.³³ When these facts are considered, the impetus behind the instant court's interpretation can be appreciated.

However, even with a liberal interpretation, article 28 can produce inequitable results. For example, in one recent case it was held that a plaintiff who purchased a ticket in the United States from one airline for transportation with another airline could not bring suit in the United States against the transporting airline because the ticket was not purchased at a place of business of the defendant.³⁴ This was true despite the fact that the defendant maintained sales offices in the United States from which it did upwards of a million dollars in American business annually.³⁵ The provision of article 28 that allows suit to be brought where defendant has "a place of business through which the contract has been made" caused no problem in 1929 when the carrier sold tickets in only a few places, all of which were staffed by its agents. But modern marketing methods make it possible for passengers to purchase tickets for transportation on any number of different carriers from the office of a single airline or from independent travel agents. It would seem that when a carrier avails itself of the privilege of doing business in a country it should be amenable to suit there, and the implementation of a modern marketing technique should

to express their meaning and to choose apt words in which to embody the purpose of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912).

³⁰ *Karlin*, *supra* note 3, at 60.

³¹ *McKenry*, *supra* note 12, at 225 & n.68.

³² 1 *KREINDLER*, *op. cit. supra* note 3, § 11.01[2].

³³ *Ibid.*

³⁴ *Eck v. United Arab Airlines, S.A.A.*, 241 F. Supp. 804 (S.D.N.Y. 1964). In a companion action brought in the state courts of New York a different result was reached by ignoring the phrase "through which the contract has been made" of article 28. See note 21 *supra*. Judge Cannella of the Southern District of New York, reconsidering his decision in *Eck* on motion for reargument, said: "The recitation of the state court history in no way indicates agreement of this court with the position taken by the New York Court of Appeals . . . While it is clear that a treaty must be liberally interpreted . . . in the view of this court, there are limits to liberality of construction." 241 F. Supp. at 808.

³⁵ *Travel Weekly*, April 28, 1964, p. 34, col. 1.

not be grounds for immunizing the carrier from such suit. Another example of the inadequacy of article 28 stems from the fact that the place of accident was not included as a place where the action could be brought.³⁶ As a result, the plaintiff is precluded from suing in the place where the witnesses and the evidence can be produced at trial with least expense. The minutes of the convention indicate that this potential forum was eliminated because the major countries of Western Europe did not want their nationals to be subjected to the poorly organized court systems of many countries over which they passed.³⁷ Since most countries have developed competent court systems over the last thirty-five years, there no longer seems to be any reason to continue to impose this burden on plaintiffs.

The inequities imposed on individuals by article 28 recently acquired additional significance when the Department of State announced that the United States would unilaterally denounce the convention in May 1966, if the limitation of liability is not substantially increased.³⁸ While the low limitation is undoubtedly the major source of dissatisfaction, it would seem that to insist *only* on a higher limitation would be a mistake. As an examination of the inequitable results occasioned by article 28 suggests, the venue section of the treaty should be redrafted. It should be liberalized to take cognizance of the changed conditions in the industry and to minimize conflicts with established venue policies of adhering states. The protective spirit of the treaty should be abandoned and new inducements to adherence, which would reduce the burden of the plaintiff, should be substituted. Article 28, for example, could be redrafted to adopt as its rationale the principle that any carrier availing itself of the economic benefits of a country should make itself amenable to suit in that country. In addition, the place of accident could be allowed as a possible forum. Thus, the common interest of nations in securing speedy and inexpensive compensation for their damaged citizens would provide one such inducement. Regardless of the position taken on individual articles, however, it would seem that the negotiations concerning the limitation of liability present an excellent opportunity for a bold modernization of the entire treaty.

F. S. M.

Employee Voluntarily Residing on Employer's Premises Compensated for Off-Duty Injury

Appellee, a practical nurse, was employed by appellant hospital and voluntarily resided in quarters on the hospital premises. While off duty, she fell on a stairway in the residence and sustained an injury for which she sought compensation. The Workmen's Compensation Division granted recovery, and the

³⁶ Calkins, *supra* note 19, at 229.

³⁷ *Ibid.*

³⁸ United States Department of State, Memorandum Concerning Warsaw Convention and Hague Protocol, Oct. 19, 1965. The United States is asking that the limitation be raised temporarily to \$75,000 with the understanding that it would later be set permanently at \$100,000.

hospital appealed to the Union County Court. *Held*, affirmed. When an employer derives benefits from having an employee voluntarily reside on the employment premises, an injury received in using those premises during off hours is compensable. *Barbarise v. Overlook Hosp. Ass'n*, 211 A.2d 817 (N.J. Union County Ct. L. 1965).

To recover under workmen's compensation, an employee must suffer an injury "arising out of and in the course of his employment . . ." ¹ New Jersey, in line with most other jurisdictions, has given this requirement a liberal construction.² As a result, coverage has been extended to include employees required to live at the place of employment who are injured on the premises during their off hours.³ However, courts have not generally extended recovery to employees voluntarily present on the premises.⁴

The instant case involved a nurse who was not required to live on the premises.⁵ In extending compensation to cover such an employee, the court relied on two lines of reasoning. The court first concluded that a nurses' residence operated by the hospital is a part of the locus or place of employment. The court pointed out that in the past compensation had been granted to employees injured while using parking lots that were part of the place of employment and indicated that compensation should also be granted in this analogous situation. The parking lot cases were constructed by the court as holding that an employee injured after hours while using the premises as contemplated by the employer should be compensated.⁶ Secondly, the court indicated that the hospital benefited by having the appellee reside on the premises since help was more readily available, employer-employee relations were improved, and the ability to compete in the labor market was enhanced. This, the court concluded, was an adequate basis for compensation.⁷

¹ N.J. STAT. ANN. § 34:15-1 (1959). Forty-one states have adopted the same language in their respective statutes. 1 LARSON, WORKMEN'S COMPENSATION LAW § 6.10, at 41 (1965). The Utah statute reads "arising out of or in the course of." UTAH CODE ANN. § 35-1-44 (1953).

² *Tocci v. Tessler & Weiss, Inc.*, 28 N.J. 582, 147 A.2d 783 (1959); *Biglioli v. Durotest Corp.*, 44 N.J. Super. 93, 129 A.2d 727 (Super. Ct. App. Div. 1957) (dictum), *aff'd*, 26 N.J. 33, 138 A.2d 529 (1958); see *Clemons v. Beardon Lumber Co.*, 236 Ark. 636, 370 S.W.2d 47 (1963); *Fink v. Cold Spring Granite Co.*, 262 Minn. 393, 115 N.W.2d 22 (1962); *Dunlap v. State Compensation Director*, 140 S.E.2d 448 (W. Va. 1965) (dictum).

³ *Carroll v. Westport Sanitarium*, 131 Conn. 334, 39 A.2d 892 (1944); *Galvez v. Gold Coast Enterprises*, 23 App. Div. 2d 600, 256 N.Y.S.2d 436 (1965); see *Prevost v. Gheens Realty Co.*, 151 La. 508, 92 So. 38 (1922); *Piazza v. Prince's Farm*, 86 N.J. Super. 100, 206 A.2d 167 (Super. Ct. App. Div. 1965); *Brooks v. Dee Realty Co.*, 72 N.J. Super. 499, 178 A.2d 644 (Super. Ct. App. Div. 1962); *John H. Kaiser Lumber Co. v. Industrial Comm'n*, 181 Wis. 513, 195 N.W. 329 (1923).

⁴ There are no previous New Jersey decisions on the problem. Other jurisdictions that have dealt with it, however, have denied recovery. *E.g.*, *Associated Oil Co. v. Industrial Acc. Comm'n*, 191 Cal. 557, 217 Pac. 744 (1923); *Medina v. Shore Road Hosp.*, 4 App. Div. 2d 974, 167 N.Y.S.2d 637 (1957); *Texas Employee's Ins. Ass'n v. Blessen*, 308 S.W.2d 127 (Tex. Civ. App. 1957); *Damron v. State Compensation Comm'r*, 109 W. Va. 343, 155 S.E. 119 (1930).

⁵ Instant case, 211 A.2d at 819.

⁶ *Id.*, 211 A.2d at 821.

⁷ *Id.*, 211 A.2d at 822.

The parking lot cases do not necessarily support the decision in the instant case, however, since they are based primarily on a theory of time rather than place.⁸ The theory is that, in the normal course of going to and coming from work, employment begins upon the employee's reaching the premises, including parking lots, and ends when he leaves those premises to go home. In cases where the courts have found that the employee was using the premises as contemplated by the employer, they were applying the rule that, if the employer could have reasonably foreseen that the employee would engage in certain activities in going to and coming from work, the time of employment would be extended to cover such activities.⁹ When this underlying rationale is compared to that of the instant case, it is evident that the two situations are not analogous. The appellee, while going to her room after sunbathing on the roof,¹⁰ was not in any way beginning or ending work. As a result, the court made no attempt to extend the time of employment to cover the appellee's accident, thus perhaps accounting for the court's additional reliance on the alternative ground of employer benefit.

One of the oldest rules for construing workmen's compensation statutes is that recovery should be based on the facts of each case.¹¹ At the same time, however, a certain predictability should be achieved. To accomplish this, we may draw general boundaries wherein the facts of each case then become determinant. Since one of the criteria for granting recovery in other areas of workmen's compensation has been the benefit derived by the employer from the activities of the employee,¹² it is here suggested that in resident-employee cases the needed boundaries may also be drawn on the same basis. The strongest showing of benefit arises when the employee is required to live on the premises

⁸ *Davis v. Chemical Constr. Co.*, 232 Ark. 50, 334 S.W.2d 697 (1960); *Hughes v. American Brass Co.*, 141 Conn. 231, 104 A.2d 896 (1954); *Konitch v. Hartung*, 81 N.J. Super. 376, 195 A.2d 649 (Super. Ct. App. Div. 1963), *certification denied*, 41 N.J. 389, 197 A.2d 15 (1964); *Rice v. Pharmaceuticals, Inc.*, 65 N.J. Super. 579, 168 A.2d 201 (Super. Ct. App. Div. 1961). See generally 1 LARSON, *op. cit. supra* note 1, § 15.

⁹ Authorities cited note 8 *supra*.

¹⁰ Instant case, 211 A.2d at 818.

¹¹ *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423-24 (1923).

¹² The primary area in which compensation has been granted is employer-sponsored recreation. *Jewel Tea Co. v. Industrial Comm'n*, 6 Ill. 2d 304, 128 N.E.2d 699 (1955) (employee injured while playing on company softball team); *Complitano v. Steel & Alloy Tank Co.*, 34 N.J. 300, 168 A.2d 809 (1961), *reversing* 63 N.J. Super. 444, 164 A.2d 792 (Super. Ct. App. Div. 1960) (adopting the lower court dissenting opinion) (employee injured on company-sponsored softball team); *Du Charme v. Columbia Eng'r Co.*, 31 N.J. Super. 167, 106 A.2d 23 (Super. Ct. App. Div. 1954) (employee injured at company party).

Recreation, however, is by no means the only area in which compensation based on employer benefit has been granted. *Boyd v. Florida Mattress Factory*, 128 So. 2d 881 (Fla. 1961) (employee injured while entertaining employer's business guests); *Neumeister v. Eastern Brewing Corp.*, 73 N.J. Super. 193, 179 A.2d 551 (Super. Ct. App. Div.), *certification denied*, 37 N.J. 88, 179 A.2d 416 (1962) (brewmaster injured while on personal visit in process of delivering beer); *Saintsing v. Steinbach Co.*, 1 N.J. Super. 259, 64 A.2d 99 (Super. Ct. App. Div.), *aff'd*, 2 N.J. 304, 66 A.2d 158 (1949) (employee injured through public health service vaccination made available by employer); *Skinner v. Tobin Packing Co.*, 17 App. Div. 2d 999, 233 N.Y.S.2d 900 (1962) (employee on business trip killed while taking wife to hospital).

either by the employer¹³ or by the force of existing circumstances.¹⁴ If it were not to the distinct advantage of the employer, the employee would not be required to use the provided housing. However, the courts have based the granting of compensation in this situation not on the benefits received by the employer, but instead on the fact that, since the employee had no real choice in subjecting himself to the risks inherent in remaining on the premises, the risks were a necessary part of the employment.¹⁵

When the employee voluntarily resides on the premises, however, the risks incidental to that residence are not a necessary part of the employment. In such cases the courts have looked to the actual advantages derived by the employer. One such advantage may be termed "specific benefit," since it can be gained only when a particular employee's job is more satisfactorily performed by his living on the premises. For example, when an employee who is on twenty-four-hour call voluntarily decides to reside on the employment premises, the employer is benefited by this particular employee's availability when needed for special assistance. This type of benefit has been held a sufficient basis for compensation.¹⁶ Another type of advantage is derived from the activity in which the employee was engaged when injured. It may be termed a "general pecuniary benefit," since it arises when an employee who, although he is not specially needed, in some way provides his employer a monetary benefit through his residence on the premises. For example, when an employee during his off-duty hours is injured while investigating a strange noise or occurrence, although this was not an assigned part of his job, a "general pecuniary benefit" results if the

¹³ The employer may require the employee to live upon the premises in one of two ways. First, he may expressly require the employee to accept the offered housing. *Carroll v. Westport Sanitarium*, 131 Conn. 334, 39 A.2d 892 (1944); *Galvez v. Gold Coast Enterprises*, 23 App. Div. 2d 600, 256 N.Y.S.2d 436 (1965); *John H. Kaiser Lumber Co. v. Industrial Comm'n*, 181 Wis. 513, 195 N.W. 329 (1923). Second, he may impliedly require the employee to live upon the premises by making the housing part of the compensation provided in the contract. *Truck Ins. Exch. v. Industrial Acc. Comm'n*, 27 Cal. 2d 813, 167 P.2d 705 (1946); *Chapman v. Kiamesha Concord, Inc.*, 15 App. Div. 2d 618, 222 N.Y.S.2d 435 (1961); *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962).

¹⁴ The leading case in this area is *Holt Lumber Co. v. Industrial Comm'n*, 168 Wis. 381, 170 N.W. 366 (1919). A lumber company provided sleeping facilities for its employees at the lumber camp. An employee was injured while asleep and recovery was allowed. Most courts today have accepted the basic premises of the *Holt* decision. *E.g.*, *Johnson v. Arizona Highway Dep't*, 78 Ariz. 415, 281 P.2d 123 (1955); *Piazza v. Prince's Farm*, 86 N.J. Super. 100, 206 A.2d 167 (Super. Ct. App. Div. 1965); *Allen v. D. D. Skousen Constr. Co.*, 55 N.M. 1, 225 P.2d 452 (1950).

¹⁵ Language typically used by courts in this regard may be found in *Johnson v. Arizona Highway Dep't*, 78 Ariz. 415, 417, 281 P.2d 123, 124 (1955).

[U]nder such circumstances he is still within the orbit of his employment while using the premises for living quarters, even though he be off duty from regular shift. The reason for this is that if his employer requires such occupancy, the same is an incident to the obligation of his regular employment. The activity of using such housing accommodations is exercised as an incident to the performance of his duties to the employer.

¹⁶ *Carl v. West Hill Sanitarium*, 15 App. Div. 2d 703, 223 N.Y.S.2d 446 (1962); see *McWilliams Dredging Co. v. Henderson*, 36 F. Supp. 361, 363 (N.D. Ala. 1941) (dictum).

This type of case rarely occurs, for, when an employee is needed frequently, he is usually required by his employer to live upon the premises. *Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N.W.2d 548 (1963); *Outlaw v. Parker*, 9 App. Div. 2d 797, 192 N.Y.S.2d 692 (1959); see *Krause v. Swartwood*, 174 Minn. 147, 218 N.W. 555 (1928).

employer is saved the cost of hiring a watchman by allowing the employee to live upon the premises. While this type of benefit has been a base for recovery in other areas,¹⁷ the courts have not used it as a means to extend recovery to voluntary resident employees.¹⁸ Another type of advantage that can be shown is a "general nonpecuniary benefit." This type of benefit is illustrated where an employee who is not on call chooses to live on the premises understanding that anyone living there might be called upon to help in an emergency. Recovery based on this type of benefit usually has not been granted.¹⁹

Since the court in the instant case found that the appellee was not required to live upon the premises, it looked to the nature of the benefit derived by the employer.²⁰ The court found that the appellee was not on call²¹ and possessed no particular abilities needed at the hospital during her off-duty hours.²² Therefore, since it could not be said that the hospital derived a specific benefit, compensation was based on the more general benefits.

¹⁷ These cases fall primarily into two groups. First, the pecuniary benefit has arisen in the form of advertising derived from some recreational activity sponsored by the employer. *Jewel Tea Co. v. Industrial Comm'n*, 6 Ill. 2d 304, 128 N.E. 699 (1955); *Cuna v. Board of Fire Comm'rs*, 42 N.J. 292, 200 A.2d 313 (1964); *Complitano v. Steel & Alloy Tank Co.*, 34 N.J. 300, 168 A.2d 809 (1961), *reversing* 63 N.J. Super. 444, 164 A.2d 792 (Super. Ct. App. Div. 1960) (adopting the lower court dissenting opinion); *McCarty v. Dahlstrom Metallic Door Co.*, 12 App. Div. 2d 673, 207 N.Y.S.2d 713 (1960). Second, the pecuniary benefit has arisen when the employee has taken care of some employment business while engaged in some personal activities on his own time. *Boyd v. Florida Mattress Factory*, 128 So. 2d 881 (Fla. 1961); *Neumeister v. Eastern Brewing Corp.*, 73 N.J. Super. 193, 179 A.2d 551 (Super. Ct. App. Div.), *certification denied*, 37 N.J. 88, 179 A.2d 416 (1962); *Skinner v. Tobin Packing Co.*, 17 App. Div. 2d 999, 233 N.Y.S.2d 900 (1962).

¹⁸ Since a general pecuniary benefit is not recognized as a separate benefit in resident-employee cases, its existence is not pointed out or discussed by the courts. Occasionally, however, the facts do make clear the presence of a direct pecuniary benefit. Such a situation arose in *Kentucky Valley Distilling Co. v. Quartermouss*, 275 Ky. 389, 121 S.W.2d 917 (1938), where an employee secured permission to sleep in the company furnace room and while there occasionally helped the night watchman, thus saving the employer the expense of hiring a helper. The court granted recovery on other grounds, not mentioning the pecuniary benefit.

¹⁹ See *Medina v. Shore Road Hosp.*, 4 App. Div. 2d 974, 167 N.Y.S.2d 637 (1957); *Groff v. Uzzilia*, 1 App. Div. 2d 273, 149 N.Y.S.2d 651 (1956), *aff'd*, 2 N.Y.2d 840, 140 N.E.2d 873, 159 N.Y.S.2d 980 (1957); *Texas Ins. Ass'n v. Blessen*, 308 S.W.2d 127 (Tex. Civ. App. 1957).

The general rule that employees voluntarily residing on the premises are refused compensation seems so well established that there are few recent cases dealing with the problem. Even many of the early cases are in reality expressions of the courts' refusals to apply the doctrine of the necessity of the circumstances to employees in reality forced to live upon the premises. *E.g.*, *Guiliano v. Daniel O'Connell's Sons*, 105 Conn. 695, 136 Atl. 677 (1927); *Danville, U. & C. Ry. v. Industrial Comm'n*, 307 Ill. 142, 138 N.E. 289 (1923); *Edwards v. Industrial Comm'n*, 87 Utah 127, 48 P.2d 459 (1935). The rule finds its greatest case support in dicta from cases involving employees in somewhat different circumstances. *Union Oil Co. v. Industrial Acc. Comm'n*, 211 Cal. 398, 403, 295 Pac. 513, 515 (1931); *Morgan v. Duncan*, 361 Mo. 683, 687, 236 S.W.2d 281, 283 (1951); *Texas Employers Ins. Ass'n v. Sparrow*, 134 Tex. 352, 358-59, 133 S.W.2d 126, 130 (1939).

²⁰ Instant case, 211 A.2d at 819.

²¹ Additional facts not discussed in the opinion but disclosed in the parties' briefs may clarify why the court made this finding of fact. The appellee had never been called from the premises to help even though several others had. The house mother of the residence testified that appellee was not subject to call. Brief for Appellant, pp. 4-5; Brief for Appellee, pp. 1-2.

²² The hospital had in effect told her that they had not needed her, but since she was there they would use her if they had to. See instant case, 211 A.2d at 818.

In other areas of workmen's compensation in which the general benefits received by the employer have formed the basis of recovery, one of those benefits has usually been pecuniary, arising directly out of the activity in which the employee was participating at the moment of injury.²³ Two of the cases relied upon by the instant court as precedent for extending general employer benefits as a basis for recovery in voluntary resident-employee cases illustrate this very well. In *Complitano v. Steel & Alloy Tank Co.*²⁴ and *Cuna v. Board of Fire Comm'rs*,²⁵ the injured employees were members of company-sponsored softball teams who played before the general public. In each case the employees wore shirts bearing the name of the employer and the pecuniary benefit claimed was advertising. Its value was substantial, and was measurable to the extent that the employers were willing to expend several hundred dollars to pay for it.²⁶ The pecuniary benefit in both cases also arose directly out of the activity in which the employees were participating when injured. There would have been no pecuniary benefit if the employees had not been engaged in playing ball. Thus, there was a direct connection between the injury and the pecuniary benefit. In the instant case, however, no pecuniary benefit was involved.²⁷

Even when the general benefits claimed have not been pecuniary, compensation has still been granted when the employer has either encouraged or controlled the employee in the activity leading to the benefit.²⁸ However, it

²³ The fact that the benefit should come directly from the activity wherein the injury took place is a conclusion demanded by logic. The only purpose for raising the benefit argument is to bring to the attention of the court that an activity, not usually considered to be a part of the job, is within the scope of employment. If there is no benefit claimed from the activity, there is no reason to make it part of the employment. See *Boyd v. Florida Mattress Factory*, 128 So. 2d 881 (Fla. 1961); *McCarty v. Dahlstrom Metallic Door Co.*, 27 App. Div. 2d 673, 207 N.Y.S.2d 713 (1960).

²⁴ 34 N.J. 300, 168 A.2d 809 (1961), *reversing* 63 N.J. Super. 444, 164 A.2d 792 (Super. Ct. App. Div. 1960) (adopting the lower court dissenting opinion).

²⁵ 42 N.J. 292, 200 A.2d 313 (1964).

²⁶ The fact that [the employer] . . . did not sell its product directly to people who saw or heard of its teams does not derogate from the indirect benefits and values which many business concerns conceive enure from the publicizing of their names in a favorable light. The "prestige" character of much present-day commercial advertising attests to this. I do not think [the employer] . . . regarded the three or four hundred dollars it spent in 1957 on this activity as a charity, but rather as a legitimate business expense

Complitano v. Steel & Alloy Tank Co., 63 N.J. Super. 444, 467, 164 A.2d 792, 804 (Super. Ct. App. Div. 1960) (dissenting opinion), *rev'd*, 34 N.J. 300, 168 A.2d 809 (1961) (adopting lower court dissent); see *Cuna v. Board of Fire Comm'rs*, 42 N.J. 292, 305-06, 200 A.2d 313, 321 (1964).

²⁷ The only benefit that could possibly be considered pecuniary, that of being better able to compete for the employment of nurses, is not measurable in terms of pecuniary gain, nor does it arise directly out of the activity in which appellee was injured. The benefit was derived when the nurses' residence was built, not when appellee moved into it. If any of the actions of the appellee had a direct connection to the benefit, they were the actions of agreeing to move into the residence and paying rent, not of walking down the stairs.

²⁸ *Winter v. Industrial Acc. Comm'n*, 129 Cal. App. 2d 174, 276 P.2d 689 (Ct. App. 1954) (caddy injured while practicing golf on employer's course at employer's request); *Du Charme v. Columbia Eng'r Co.*, 31 N.J. Super. 167, 106 A.2d 23 (Super. Ct. App. Div. 1954) (employer gave free gifts to encourage attendance at party); *Saintsing v. Steinbach Co.*, 1 N.J. Super. 259, 64 A.2d 99 (Super. Ct. App. Div.), *aff'd*, 2 N.J. 304, 66 A.2d 158 (1949) (employees encouraged to take advantage of free vaccination offered by employer); *Sargeant v. Tilo Roofing Co.*, 18 App. Div. 2d 1037, 238 N.Y.S.2d 645 (1963) (employee injured at picnic sponsored and wholly controlled by employer);

does not appear that the basis for compensation in such cases was general benefits. Where the employer has encouraged the employee, the rationale for recovery is much like that used for cases wherein the employee is required to live upon the premises. It appears to be based upon the notion that this is very nearly a form of compulsion.²⁹ Where the employer has retained almost complete control of the employee, the courts have concluded that the difference between the activity creating the benefit and the actual employment is small and they have granted recovery on that basis.³⁰ In the instant case there was no employer encouragement, since it was the appellee who had requested permission to reside on the premises.³¹ Nor was there employer control, since the appellee's off-duty time was her own and, except for a few minor rules of propriety,³² she was free to use the residence as she would her own home. When there is neither pecuniary benefit, employer encouragement, nor employer control, the rule has been that general benefits will not support compensation.³³

Tedesco v. General Elec. Co., 305 N.Y. 544, 114 N.E.2d 33 (1953) (employee injured in activity of athletic association wholly controlled by employer); *Shoemake Station v. Stephens*, 277 P.2d 998 (Okla. 1954) (reluctant employee injured in boxing match with employer at his request); see *Moore's Case*, 330 Mass. 1, 110 N.E.2d 764 (1953) (dictum); *Harrison v. Stanton*, 26 N.J. Super. 194, 97 A.2d 687 (Super. Ct. App. Div. 1953) (dictum), *aff'd*, 14 N.J. 172, 101 A.2d 554 (1954); 1 LARSON, *op. cit. supra* note 1, §§ 22.22-24.

²⁹ "It would not be realistic to find that respondent's . . . inducement to the employees of wages without work while enjoying the affair did not constitute a far greater and more effectual compulsion upon the employees' attendance than . . . mandatory attendance." *Kelly v. Hackensack Water Co.*, 10 N.J. Super. 528, 536, 77 A.2d 467, 471 (Super. Ct. App. Div. 1950); *accord*, *Winter v. Industrial Acc. Comm'n*, 129 Cal. App. 2d 174, 276 P.2d 689 (Ct. App. 1954); *Du Charme v. Columbia Eng'r Co.*, 31 N.J. Super. 167, 106 A.2d 23 (Super. Ct. App. Div. 1954); *Shoemake Station v. Stephens*, 277 P.2d 998, 1002 (Okla. 1954).

³⁰ "The sole question . . . is whether . . . 'the employer did exercise such control . . . as to constitute such activities a part of the employment' . . . Viewed as a whole there is substantial evidence that . . . the employer benefited from and dominated the program. . . ." *Nahabedian v. Equitable Life Ins. Co.*, 16 App. Div. 2d 713, 226 N.Y.S.2d 881, 882, *appeal denied*, 11 N.Y.2d 647, 183 N.E.2d 770 (1962); *accord*, *Tedesco v. General Elec. Co.*, 305 N.Y. 544, 114 N.E.2d 33 (1953); see *Moore's Case*, 330 Mass. 1, 110 N.E.2d 764 (1953) (dictum); *Harrison v. Stanton*, 26 N.J. Super. 194, 97 A.2d 687 (Super. Ct. App. Div. 1953) (dictum), *aff'd*, 14 N.J. 172, 101 A.2d 554 (1954).

³¹ Instant case, 211 A.2d at 818.

³² There were special rooms in the residence maintained for certain activities that were apparently not to be carried on in the girls' private rooms. For example, there were "beau" rooms, a television room, and a game room. See instant case, 211 A.2d at 818; Brief for the Appellant, p.1; Brief for the Appellee, p.2.

³³ *E.g.*, *Lindsay v. Public Serv. Co.*, 146 Colo. 579, 362 P.2d 407 (1961); *Gordon v. United Aircraft Corp.*, 24 Conn. Supp. 262, 189 A.2d 792 (Super. Ct. 1962), *aff'd*, 150 Conn. 328, 189 A.2d 384 (1963); *Congdon v. Klett*, 307 N.Y. 218, 120 N.E.2d 796 (1954); *Wilson v. General Motors Corp.*, 298 N.Y. 468, 84 N.E.2d 781 (1949); 1 LARSON, *op. cit. supra* note 1, § 22.30.

New Jersey, however, in *Ricciardi v. Damar Prods. Co.*, 45 N.J. 54, 211 A.2d 347 (1965), a supreme court decision handed down eleven days prior to the decision in the instant case, allowed recovery in a situation involving a recreational activity in which there was no pecuniary benefit, employer encouragement, or employer control present. In allowing general benefits as a basis for recovery, the court clearly broke with previous New Jersey law as summarized in the decision of the appellate division. *Ricciardi v. Damar Prods. Co.*, 82 N.J. Super. 222, 197 A.2d 390 (1964); see *Cuna v. Board of Fire Comm'rs*, 42 N.J. 292, 200 A.2d 313 (1964); *Complitano v. Steel & Alloy Tank Co.*, 34 N.J. 300, 168 A.2d 809 (1961), *reversing* 63 N.J. Super. 444, 164 A.2d 792 (Super. Ct. App. Div. 1960) (adopting lower court dissent); *Du Charme v. Columbia Eng'r Co.*, 31 N.J. Super. 167, 106 A.2d 23 (Super. Ct. App. Div. 1954); *Kelley v. Hackensack Water Co.*, 10 N.J. Super. 528, 77 A.2d 467 (Super. Ct. App. Div. 1950). The type of

By granting recovery based upon the general benefits received by the employer, the court in the instant case greatly expanded the coverage of workmen's compensation. Under this rule, an employee on the premises with his employer's consent will be covered regardless of his purpose in being there, so long as the employer is in some way benefited. This limitation is illusory, since benefits such as better employee morale or improved employer-employee relations could always be shown. For example, an employer who, as a personal favor, allows an employee to remain after working hours and use company tools to make Christmas toys for his children would be liable for any injury resulting from the contemplated use of those tools. Furthermore, if an employer, as a service to his employees, procures housing near the place of employment for them, any injury on those premises might be compensable because it results in a general benefit to the employer. Carried to its logical extension this open-ended definition of benefit would leave few employer-employee relationships outside the reach of workmen's compensation. Since a shorter work week usually boosts an employee's morale, activities in his newly found spare time might be covered.

In laying down such a precedent, the instant court has gone far beyond the scope of workmen's compensation as contemplated by the drafters of the legislation. Although the purpose of the act was to benefit the employee, it was not intended as a general insurance plan for employees³⁴ — in effect, the end result of the instant case. This would not have occurred if the court had set the limits of recovery at "general pecuniary benefits." The showing of such a benefit is somewhat more difficult, and recovery would be limited to those cases wherein the employer, being able to weigh the advantages against the increased burden, has proceeded on the supposition that he would ultimately profit from the activity.

By not making this limitation, the instant court has created problems for both employer and employee. Since most general benefits are of uncertain value, many employers provide activities giving rise to these benefits primarily in the interest of their employees. By imposing liability without fault on the employer in these situations, the court will frequently punish an employer for

situation presented by the instant case is easily distinguishable from the *Ricciardi* case, however. The *Ricciardi* case need not serve as precedent when higher New Jersey courts are faced with future voluntary resident-employee cases. This type of precedent allowing recovery based on general benefits creates some important problems and should not be extended beyond its facts.

Utah may also be moving in the direction of extending coverage based solely on general benefits. In the two recent decisions, *Askren v. Industrial Comm'n*, 15 Utah 2d 275, 391 P.2d 302 (1964), and *Wilson v. Sears, Roebuck & Co.*, 14 Utah 2d 360, 384 P.2d 400 (1963), Utah held, in line with most other jurisdictions, that injuries received on the premises of the employer during the lunch period were compensable. Like the parking lot cases, these decisions have usually been based on a notion of time. See 1 LARSON, *op. cit. supra* note 1, § 21.21(a). However, in *Askren* and *Wilson* the Utah court suggested that recovery could have been based upon benefits received by the employer through better employer-employee relations. Whether the court meant this as a rationale only for lunch-hour cases is entirely unclear.

³⁴ *Mergel v. New Jersey Conveyors Corp.*, 14 N.J. 609, 613, 103 A.2d 594, 596 (1954); Note, *Workmen's Compensation Law in New England*, 42 B.U.L. Rev. 492, 519 (1962); see *Taylor v. Twin City Club*, 260 N.C. 435, 439, 132 S.E.2d 865, 868 (1963).

his benevolence. Furthermore, even though an employer is unable to measure the extent of a general benefit, such benefits may nevertheless be important to both employer and employee. Should recovery be extended to injuries arising out of such benevolent activities, workmen's compensation will thwart its own purpose of benefiting the employee. It is submitted that, when the very real burden of liability placed upon the employers by the instant case is compared with the vague and immeasurable benefits received under these circumstances, the contrast will force many employers to discontinue the beneficial activities.

G.E.D.

Unclaimed Debts Owed by Corporation Held Escheatable by State of Creditor's Last-Known Address

A New Jersey corporation was the holder of unclaimed personal property which it owed to creditors whose last-known addresses were in various states. Texas, invoking the original jurisdiction of the Supreme Court,¹ brought an action against New Jersey, Pennsylvania, and the holder for a declaration of rights concerning which state had jurisdiction to escheat the unclaimed property. The Court *held* that unclaimed obligations owed by a corporation are subject to escheat only by the state of the creditor's last-known address as shown by the holder's books and records. However, if the corporate records fail to indicate a last-known address, or the address is in a state which does not provide for escheat of personal property, the state of corporate domicile may escheat the property subject to the rights of any other state which can prove it was the creditor's last residence. *Texas v. New Jersey*, 379 U.S. 674 (1965).

Cases which have come before the Supreme Court concerning the right of states to escheat intangible property have most often involved the question of whether a state's decision to escheat would bind the creditors and protect the holder from multiple liability.² These cases did not adjudicate multiple state claims to the same property, and the policy was adopted that no state's

¹ "The judicial Power shall extend . . . to Controversies between two or more States. . . . In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2.

² The Court has used a variety of approaches to determine whether a state could escheat the property. In *Security Savings Bank v. California*, 263 U.S. 282 (1923), the Court held that California could escheat the property since savings deposits in a banking corporation doing business within the state of its creation are subject to the in rem jurisdiction of that state. Therefore, California had effected a seizure of the deposits by notifying the bank of the escheat proceedings. Later, in *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), the Court held that New York could escheat since it had sufficient contacts with the transaction and the parties which created the obligation to escheat the property. However, escheat was allowed only on those policies which were issued in New York upon the lives of New York residents and where the insured continued to be a resident and the beneficiary was a resident when the policy matured. In *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), New Jersey was permitted to escheat unclaimed stock and stock dividends since it had obtained jurisdiction to escheat by personal service on the corporate debtor. Justice Frankfurter, dissenting, maintained that the test proposed by the majority, and the contacts test used in the *Moore* case, would make escheat a mere race of diligence, and any state could escheat the property by service on the corporate debtor. *Id.* at 443 (dissenting opinion). In *Western Union*

claim would be recognized unless actively pursued before the Court.³ Thus, by avoiding the adjudication of multiple state claims, the Court had not provided a rule which the states could follow to determine final rights to unclaimed personalty.

The instant case presented the Court with four active claimants, thus necessitating the establishment of a rule that would govern multiple state claims. The four states which asserted rights to the property based their claims on several grounds. Texas claimed the property under a "most significant contacts" test, contending it was the state that had contributed the most to the production of the unclaimed personalty.⁴ New Jersey maintained that the Court should apply a "state-of-incorporation" test,⁵ while Pennsylvania proposed that the property escheat only to the state in which the corporation's principal place of business was located.⁶ In addition to the claims of these states, the Court permitted Florida to intervene with its assertion that the property should escheat to the state of a creditor's last-known address.⁷

The Court dismissed the contacts test proposed by Texas because it would require that the Court engage in a case-by-case evaluation of each separate controversy. Furthermore, the uncertainty of such a rule would lead to exces-

Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961) (dictum), the Court stated that no given item of property could be escheated by more than one state, thus resolving the problem of escheat becoming a race of diligence. However, the Court did not establish a test to determine which state had the better right to the property. *Id.* at 79.

³ Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 549-50 (1948). See generally Lake, *Escheat, Federalism and State Boundaries*, 24 OHIO ST. L.J. 322, 334-35 (1963).

⁴ Brief for State of Texas as Plaintiff, pp. 45-53. Texas maintained that the question of which state has the right to escheat the property should not be based on a fictional situs of the property but instead on choice-of-law principles. Texas proposed that the Court follow what has been termed the "points of contact," "grouping of contacts," or "center of gravity" theory, and give the personalty to the state which had the most significant contacts with the property. Texas maintained that under this test, the Court would be able to take into account all of the known facts relating to these intangible obligations and the transactions out of which they arose. Furthermore, Texas asserted that this procedure would permit the Court to make a decision that is equitable rather than one dictated by legal fiction. *Id.* at 38-45. Thus, Texas claimed that part of the personal property consisting of royalty interests, mineral interests, and money due from delay rentals. The property resulted from Sun Oil Company's operations in Texas, and, since such property under Texas law is real property, Texas asserted that it had the right to escheat it as though it were ordinary real property. *Id.* at 28-38.

⁵ New Jersey claimed that such a test would foster convenience, economy, and certainty for both the debtor who was holding the property and the states who professed an interest in it. Brief for State of New Jersey as Defendant, p. 28. New Jersey also stressed the fact that its statute would protect the rights of the true owner, since procedural safeguards were written into its statute. *Id.* at 27-28.

⁶ Instant case at 680. Pennsylvania subsequently withdrew from the case and did not file a brief with the Supreme Court.

⁷ Florida maintained that the principle of *mobilia sequuntur personam* — that intangible properties follow the person who owns them — should apply. It argued that under this rule, intangibles should have a situs at the domicile of the owner, and maintained that such a rule would facilitate practical justice, since courts would not hesitate to depart from the rule and adopt a different situs where its application would produce injustices and inequities. Brief for State of Florida as Intervenor, pp. 20-28. For cases applying the principle expressed by Florida see, e.g., *Baldwin v. Missouri*, 281 U.S. 586 (1930); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Blodgett v. Silberman*, 277 U.S. 1 (1928).

sive litigation.⁸ In rejecting New Jersey's claim, the Court reasoned that a "state-of-incorporation" test would be inequitable, since a large percentage of the proceeds would be retained by the few states in which large corporations have incorporated. Thus, the proceeds would not be spread among the states in proportion to the dispersal of a corporation's creditors.⁹ The test proposed by Pennsylvania was found unacceptable, since it would result in difficulties inherent in any attempt to determine the location of a corporation's principal place of business.¹⁰ Other tests have been proposed as a solution to the problem of multiple state claims to the same property,¹¹ but the Court declined to discuss them. By adopting the "last-known-address" rule proposed by Florida, the Court thus established a rule that is uniform, easy to administer, and which promotes an equitable distribution of the personalty among the states in proportion to the commercial activities of their residents.¹²

Although the Court referred to its solution as one that "could have been resolved otherwise, for the issue here is not controlled by . . . past decisions, nor is it entirely one of logic,"¹³ the result appears both appropriate and necessary in view of the nature of the problem. However, many difficulties still remain in providing full implementation of the rule of the instant case. State escheat statutes based on jurisdiction over the holder will no longer be enforceable

⁸ The Court maintained that such a test would result in an entirely subjective decision concerning which state's claim was superior. However, the Court made no mention of Texas' assertion that at least part of the personalty should be treated as ordinary real property. Instant case at 678-79.

⁹ The Court said that, although the test would be easy to administer, it would "too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." Instant case at 680.

¹⁰ *Ibid.* The Court also said that the debts were an asset of the creditor and not the debtor, and it would, therefore, be inequitable to allow a state to convert the property into an asset for purposes of escheat. The Court referred to one case which had expressed this idea in the following language:

Debts . . . only possess value in the hands of the creditors. . . . All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that might be. . . . [D]ebts can have no locality separate from the parties to whom they are due.

State Tax on Foreign-held Bonds, 82 U.S. (15 Wall.) 300, 320 (1872).

¹¹ In 36 NOTRE DAME LAW. 426 (1961), the test proposed was the place of the origin of the obligation, since such a test would be easy to administer. A more complex test was proposed in 35 VA. L. REV. 336, 347 (1959). The author suggested that the jurisdictional test for unclaimed insurance proceeds should be sovereignty over the business transactions and the policy owner at the time the policy was issued.

¹² Instant case at 681. The special master, who was appointed by the Court to take evidence and make appropriate reports, also favored this test, since he felt it was important to assign a legal situs to the property. Therefore, he applied the rule of *mobilia sequuntur personam*, determining that the state in which the creditor had resided last had the best claim. Report of the Special Master, pp. 22-23. Other proposals have also favored the test of the creditor's last-known address. See 9A UNIFORM LAWS ANN. 253 (1957); 1 HARV. J. LEGISLATION 151 (1964). The Harvard proposal states that the "state in which the owner was last known to live has the most equitable claim to the abandoned property. . . . Had the owner claimed the property, much of its value would presumably have been spent in that state. Also, that state provided public services which benefited the owner." *Id.* at 157.

¹³ Instant case at 683.

unless the creditor's last-known address is within that state.¹⁴ On the other hand, the enforceability of the claim of the state authorized to escheat under the rule of the instant case will be hindered by several possible problems. The one state that has the right to escheat may not be able to get jurisdiction over a foreign holder which does no business within that state, and, consequently, it may be unable to compel the holder to inform the state of the existence of escheatable intangibles. Furthermore, even if the state knew of the personalty, it could not compel such a holder to surrender the abandoned property without filing suit in the court of another state. Such a procedure would be expensive and time consuming, and would, as a practical matter, only be used for large claims. Thus, if a state cannot easily and inexpensively collect the small claims which constitute a large portion of escheatable property,¹⁵ it appears likely that the holder would retain much of the property. In addition, states not authorized to escheat under the rule of the instant case could violate the rule and escheat the personalty, thus necessitating lengthy and expensive litigation in the Supreme Court by the state having primary rights to the property under the instant rule.

The problems left unanswered by the instant case could be resolved in several ways. It is conceivable that these problems will give impetus to the enactment of a uniform escheat law similar to that already adopted in some states.¹⁶ Although most provisions of the present uniform act could be retained, such as those requiring the holder to file reports and the state to publish notice of property subject to escheat,¹⁷ several modifications may be needed. One such modification would enable the state of a creditor's last-known address to acquire jurisdiction over the holder and compel both the disclosure of information relating to property that has become abandoned and the relinquishment of such property. Generally, the state can compel such actions only by acquiring in personam jurisdiction over the holder; but, under the present laws, jurisdiction cannot be asserted unless the holder has some minimal contacts with the state.¹⁸ The Supreme Court could resolve this jurisdictional problem by ruling that, if a state is entitled to escheat personal property, it may obtain jurisdiction over a holder — whose sole contact with the state is the fact that it is the last address of the creditor — by serving notice through the mails. This would substantially extend the minimal-contact rule promulgated in *International Shoe Co. v. Washington*,¹⁹ but it does not seem unjustified in view of the problems

¹⁴ For some of the broad escheat statutes that permitted a state to escheat unclaimed property regardless of the creditor's last address, see, e.g., N.J. STAT. ANN. § 2A:37-11 (1952); N.Y. ABAND. PROP. LAW §§ 300, 700.

¹⁵ In the instant case, small claims constituted the major portion of the property and some of these had lain unclaimed for forty years. Brief for State of New Jersey as Defendant, pp. 18-19.

¹⁶ E.g., ARIZ. REV. STAT. ANN. §§ 44-351 to -378 (1956); UTAH CODE ANN. §§ 78-44-1 to -29 (Supp. 1965). See Lake, *supra* note 3, at 324-25.

¹⁷ 9A UNIFORM LAWS ANN. 253, 263-64 (1957).

¹⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); see also *Hanson v. Denckla*, 357 U.S. 235 (1958).

¹⁹ 326 U.S. 310 (1945).

involved.²⁰ A further modification of the uniform act is needed to enable a state to enforce judgment once it is obtained. This objective could be realized if a state that had obtained a valid judgment were permitted to petition the attorney general of the state in which the holder maintains its property to enforce the judgment.

Even if the uniform act were modified as suggested, it appears several problems would still remain. Past experience with the uniform act indicates that many states may refuse to accept it,²¹ or, even though accepting it, may enact substantial changes which could subvert the uniformity desired. In addition, such an act would, of necessity, require cooperation among the states to assure its proper implementation. Cooperation among the states is not easily obtained and, without it, the purposes of the statute could be defeated.

Since it is unlikely that a uniform act could be adopted, it is proposed that Congress enact a broad federal statute to govern the escheat of abandoned intangible property and rectify the difficulties left unresolved by the Court's decision. Since the problem involves two or more states and property that has an effect on interstate commerce,²² its regulation could be brought within the commerce power. In similar areas, congressional regulation of intangibles has frequently been sustained on the ground that Congress can regulate interstate traffic of many types.²³ Therefore, congressional action regulating the escheat of intangible personal property should also be sustained. Such an enactment, like that of the uniform laws, would assure all states a right to the personalty in proportion to the commercial activities of its residents, but, unlike the proposed modification of the uniform act, could not be significantly altered and weakened by changes in each of the fifty states.

²⁰ There are strong indications in the opinion of the instant case that the Court may have intended that a state be permitted jurisdiction over the holder. The Court indicated at the outset of its opinion that the instant case involved a controversy concerning "which State has jurisdiction" to escheat. Instant case at 675. Furthermore, in discussing the rule proposed by Florida and adopted by the Court, it stated, "fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address . . ." *Id.* at 680-81. (Emphasis added.) The Court favored the rule, since it would tend to distribute the personalty among the states in proportion to the commercial activities of their residents, and because it recognized that a debt is an asset of the creditor and not the debtor. *Id.* at 681. However, these two objectives would not be achieved unless all the states could obtain jurisdiction over both the large and small holders to compel performance. Otherwise, the rule of the Court would be frustrated and much of the property would lay unclaimed.

²¹ The proposed uniform act has been adopted in only twelve states. 1 HARV. J. LEGISLATION 151-52 (1964).

²² Although the case dealt with tangible property, the Court has held in *Wickard v. Filburn*, 317 U.S. 111 (1942), that Congress has the power to regulate articles that may affect commerce, even though they do not actually enter the channels of commerce. Furthermore, the Court has taken an expansive view of the power of Congress to legislate under the commerce clause:

The power granted Congress . . . is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; — to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 552 (1944).

²³ *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964) (allowing FPC jurisdiction over all power sales in interstate commerce); *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (regulation of investment contracts); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (regulation of insurance).

Although drafting such a statute is beyond the scope of this discussion, it is proposed that the statute incorporate several features. Perhaps the most important of these would permit a state to obtain in personam jurisdiction over a holder with whom it has no contacts by serving notice through the mails. Such a procedure would be a statutory extension of the *International Shoe* doctrine²⁴ and would alleviate the jurisdictional problem discussed earlier. But, since it would still require great expense for the representatives of a state that had obtained a judgment to travel to another state to enforce it, the statute should include a provision requiring the holder to surrender the unclaimed personalty directly to the states. If the holder refused to comply, a state could accumulate the judgments against holders in a particular state until there was a sufficient amount to warrant the expense of enforcing the judgments. Furthermore, the statute should incorporate features that would make compliance by the holder easy and inexpensive. To further this objective, the holder of unclaimed property should be required to submit reports only to the state of a creditor's last address. The information to be included in these reports and the time of filing with the state should be standardized, and any additional factors tending to decrease the procedural burdens on the holder should also be included. In addition, the statute should incorporate a time limit declaring when personalty will be deemed abandoned,²⁵ and also a time limit within which the owner may redeem his property.²⁶ Finally, to eliminate the possi-

²⁴ Since the Court in *Hanson v. Denckla*, 357 U.S. 235 (1958), has reiterated its position that a state must have some minimal contacts with a party to obtain in personam jurisdiction over him, the proposed statute could present constitutional problems. However, the rationale behind escheat is that it is better for society to utilize unclaimed or abandoned property than for such property to accrue to the individual or corporation with whom it is left. Note, 61 COLUM. L. REV. 1319, 1326-27 (1961); Note, 112 U. PA. L. REV. 95, 101-02, 107 (1963). Therefore, unless the state could assert its rights without the jurisdictional difficulties, this objective would be frustrated. Perhaps the situation could be analogized to the nonresident-motorist cases. It is suggested that these statutes are not really based on "consent" but on the special interest a state has in regulating its highways. See *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 341 (1953). In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), jurisdiction was based primarily on the fact that the sale of securities and insurance was an activity in which the state had a particularly important interest. See Currie, *The Growth of the Longarm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 540. Likewise, in the case involving the escheat of intangibles, the state has an unmistakable interest in the abandoned property, since it represents an important source of revenue to it; and, since the Court has given the state of last address sole rights to the property, it is conceivable that the state of a creditor's last address would get jurisdiction on the basis that it had a strong interest in the property. The Court assigned a fictional situs to the property, and perhaps it intended that the state wherein the situs was fixed be allowed easy access to the personalty. Less likely is the possibility that the Court intended that a state must have jurisdiction over both the debtor and creditor before escheat would be allowed. See 60 NW. U.L. REV. 550, 557 (1965). One discussion of the instant case asserted that, even though personal service was obtained in earlier cases, it will have to give way under the current rule to service by publication. 33 GEO. WASH. L. REV. 979, 983 & nn.33-36 (1965).

²⁵ The uniform laws advocate a seven-year period. This appears to be a good minimum-time rule, since it gives the creditor time to locate his property and the debtor time to find the true owner. 9A UNIFORM LAWS ANN. 253 (1957).

²⁶ At the present time, it has been estimated that the average generally refunded to claimants under the various state statutes is only 10 to 15% of the total amount escheated. McBride, *Unclaimed Dividends, Escheat Statutes & the Corporation Lawyer*, 14 BUS. LAW. 1062, 1066-68 (1959). However, now that the creditor need only look to the state of his last address instead of having to look to several states as before, perhaps the percentage will increase. The importance of owner protection should not be over-

bility of the holder receiving a windfall, the statute should incorporate the rule of the instant case where the corporate books fail to show the creditor's last-known address. In this situation, the state of incorporation would escheat the property, subject to another state's showing that it was the state of the last address of the creditor.²⁷

The proposed statute would have several practical advantages. Since the statute would standardize the format for the reports and enable the holder to compile and distribute only one report for each item of abandoned property, it would alleviate the problem that holders now face of filing a number of slightly different reports in several states.²⁸ In addition, protection of the true owner is advanced by the proposed statute, since it would mean he need only look to the corporate records and from them to the state which the records show to be his last address to determine the status of his property. Owner protection would be further enhanced if the statute were to incorporate a provision, now found in many state statutes, that the state escheating the property publish the names of the owners and the types of property subject to escheat.²⁹ The jurisdictional problem is also resolved, since, under the statute, a state could compel the holder to perform by notification. The ease with which a state could obtain jurisdiction would also reduce the costs a state must incur to assert its rights to the personalty. Generally, holders have not maintained that they have a stronger right to abandoned property than the states.³⁰ Presumably, they would allow the states to escheat such property, if the procedure for doing so were inexpensive to the holder and assured him protection from liability for subsequent claims to the property.

Although the Court's solution is the best one possible under the circumstances, it leaves many problems which, if left unresolved, could render the rule of the instant case ineffective in certain areas. Therefore, it seems that the present proposal would solve these practical problems, even though it would require an expansion of the current concepts of jurisdiction. Moreover, since

looked. As one author has stated, the "owner protection rationale is probably the most important today Escheat has reached a stage of development where it cannot afford to remain a feudal vestige with haphazard modern trappings, the sole function of which is to fill the state's coffers." Note, 112 U. PA. L. REV. 95, 133-34 (1963).

²⁷ Instant case at 682 (dictum). It is possible that this procedure could raise questions relating to what a state must prove to show it was the last address of the creditor. The courts could be faced with such proof as voting records, tax payments, employment records, etc., and the Court in the instant case has given no criterion that could be used by the courts to determine the multistate squabbles that could result.

²⁸ The reports may vary on several particulars. For example, the uniform law requires every person holding abandoned property which has a value of three dollars or more to file a report with the state treasurer. 9A UNIFORM LAWS ANN. 253, 263 (1957). Various states, however, have set different amounts. *E.g.*, ARIZ. REV. STAT. ANN. § 44-361 (1956) (\$5); WASH. REV. CODE § 63.28.170 (1958) (\$10). Under the rule of the instant case, a holder would have to keep current with the peculiarities of the escheat laws in each state where his creditors are located.

²⁹ *E.g.*, N.J. STAT. ANN. § 17:9-23 (1963); UTAH CODE ANN. § 78-44-12 (Supp. 1965); see also 9A UNIFORM LAWS ANN. 253, 264 (1957).

³⁰ In the instant case, the holder did not claim any interest in the property, but asked only that it be protected from multiple liability. Instant case at 676. The holders in other cases involving the escheat of unclaimed personal property have also been concerned primarily with protection from multiple liability. See *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *Security Savings Bank v. California*, 263 U.S. 282 (1923).

unclaimed personalty has been estimated to be accumulating at the rate of one billion dollars each year,³¹ unless a workable solution can be reached that would give states easier and less expensive ways of asserting claims to the property, they will be denied this valuable source of revenue. A federal problem requires a federal solution and since the advantages of a federal statute appear to outweigh the disadvantages, the rule of the instant case should be implemented by legislation.

S.F.C.

Government Pensions Held To Be Contracts Which Cannot Be Unilaterally Modified After Employment

Plaintiff, a retired civil servant, brought a declaratory judgment action to determine his rights in a statutory pension plan. He contended that the amount of his pension benefits should be fixed in accordance with the plan in effect at the time he commenced employment,¹ and not in accordance with the plan as it was amended during his employment.² The trial court found for the defendant pension board, and on appeal the Arizona Supreme Court *held*, reversed. A public employee has a contract right in the pension plan which was in effect at the time he commenced employment. *Yeazell v. Copins*, 402 P.2d 541 (Ariz. 1965).

In determining pension rights of public employees, a majority of courts finds pensions to be gratuities. These courts reason that, since no consideration for the pension is given, no contract is formed, and the right to a pension never vests.³ Under this theory, pensioners have no rights except to payments due and owing.⁴ However, a growing number of courts have modified the majority doctrine by holding that the pension vests upon retirement, thus precluding subsequent modification.⁵ Under a third theory, pension plans are held to be contracts which create rights that vest upon employment, but are nevertheless

³¹ Wall Street Journal, Jan. 22, 1962, p. 1, col. 1. Escheat of personalty is especially lucrative in the year immediately following the passage of a state's escheat statute. However, it may remain rewarding several years after enactment of the law, as evidenced by New Jersey which escheated \$1,175,000 eleven years after it enacted comprehensive legislation. McBride, *supra* note 26, at 1067.

¹ Ariz. Laws 1937, ch. 40, § 9, at 127.

² ARIZ. REV. STAT. ANN. § 9-925 (1956).

³ See, e.g., *Pennie v. Reis*, 132 U.S. 464 (1889); *Pecoy v. City of Chicago*, 265 Ill. 78, 106 N.E. 435 (1914); *State ex rel. Risch v. Board of Trustees of Policemen's Pension Fund*, 121 Wis. 44, 98 N.W. 954 (1904).

⁴ See, e.g., *Pennie v. Reis*, *supra* note 3; *Spina v. Consolidated Police & Firemen's Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169 (1964); *City of Dallas v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009 (1937). See generally Annot., 52 A.L.R.2d 440 (1957); 3 McQUILLIAN, MUNICIPAL CORPORATIONS § 12.144, at 602-04 & nn.69-73 (3d ed. 1963).

⁵ E.g., *State ex rel. Downing v. Johnson*, 101 Ohio App. 496, 137 N.E.2d 132 (1956); *McBride v. Board of Trustees of Police Pension & Retirement Bd.*, 330 Pa. 402, 199 Atl. 130 (1938); *Driggs v. Utah State Teachers Retirement Bd.*, 105 Utah 417, 142 P.2d 657 (1943).

amendable by the legislature.⁶ The courts following this doctrine find consideration in the employee's service and in his contributions to the pension fund.⁷ Unless the plan itself provides for modification,⁸ it can only be altered when the change is needed to improve the actuarial soundness of the plan or when disadvantages to the employee are accompanied by comparable advantages.⁹

In the instant case, the Arizona court overruled previous cases¹⁰ and joined a substantial minority of jurisdictions which accept a fourth theory¹¹ — strict-contract rights in the pension plan. The court held that gratuitous pensions were prohibited by a state constitutional provision against granting gifts.¹² Furthermore, since the plaintiff's pension was part consideration for his entrance into and continuation in public employment, it constituted a part of his employment contract.¹³ This contract, the court concluded, was mutually binding, and included in its terms the state pension law in effect when plaintiff was first employed. Thus, since the pension could not be unilaterally modified by the state, the original plan and not the amended version determined plaintiff's pension rights.¹⁴

The instant court's refusal to allow unilateral modification contrasts sharply with rules adopted in jurisdictions following other pension theories. The result in the instant case almost certainly precludes the possibility of the modification or abrogation of pension plans. In contrast, abrogation is possible in gratuity jurisdictions and could happen at a time when pensioners are in no position to compensate for any lost retirement income. Although a pension which vests upon retirement cannot be modified thereafter, an employee on the verge of retirement could be deprived of his pension.¹⁵ And those jurisdictions — which

⁶ *E.g.*, *Houghton v. City of Long Beach*, 164 Cal. App. 2d 298, 330 P.2d 918 (Dist. Ct. App. 1958); *Eisenbacher v. City of Tacoma*, 53 Wash. 2d 280, 333 P.2d 642 (1958); *cf.* *Police Pension Bd. v. Denney*, 84 Ariz. 394, 330 P.2d 1 (1958); *Police Pension & Relief Bd. v. Bills*, 148 Colo. 383, 366 P.2d 581 (1961). *But cf.* *Robinson v. Police Pension Bd.*, 85 Ariz. 384, 339 P.2d 739 (1959).

⁷ See *Baker v. Retirement Bd.*, 374 Pa. 165, 97 A.2d 231 (1953); *Backenhus v. City of Seattle*, 48 Wash. 2d 695, 296 P.2d 536 (1956).

⁸ See *King County Employees' Ass'n v. State Employees' Retirement Bd.*, 54 Wash. 2d 1, 336 P.2d 387 (1959).

⁹ *Allen v. City of Long Beach*, 45 Cal. 2d 128, 287 P.2d 765 (1955).

¹⁰ Prior to the instant case, Arizona apparently followed the third theory. See note 6 *supra*. *Police Pension Bd. v. Denney*, 84 Ariz. 394, 330 P.2d 1 (1958), involving the same two pension acts as the instant case, held that the legislature could modify the original act to suspend the pension of a pensioner who, subsequent to retirement, takes further employment from the state. *Robinson v. Police Pension Bd.*, 85 Ariz. 384, 339 P.2d 739 (1959), held under facts almost identical to the instant case — that the legislature could modify the pension.

¹¹ Georgia accepted the strict-contract theory by case law in *Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756, *cert. denied*, 340 U.S. 878 (1950). New York accepted it by constitutional amendment N.Y. CONST. art. V, § 7. See also MO. REV. STAT. § 169.510(2) (1957), which provides for vesting of a teacher and school-employee pension.

¹² "Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever . . . make any donation . . . to any individual, association, or corporation . . ." ARIZ. CONST. art. IX, § 7.

¹³ Instant case at 544-45.

¹⁴ *Id.* at 544.

¹⁵ *Nelson v. Board of Directors*, 246 Iowa 1079, 70 N.W.2d 555 (1955).

allow some unilateral modification under the theory that the contract is not for a specific pension but merely for one that is substantial or reasonable¹⁶ — disregard the established doctrine that the terms of a contract are fixed when the contract is made and cannot be unilaterally modified thereafter.¹⁷ Under the reasonable-modification theory an employee does not know whether the amendment is reasonable until it has been litigated, while under the present ruling all amendments are unreasonable and the employee can expect a pension in accordance with his employment contract.¹⁸

Furthermore, the result in the instant case seems rational in light of modern socioeconomic conditions. A burgeoning class of aged citizens,¹⁹ having found it difficult to save enough income during their productive years to provide adequate retirement,²⁰ now finds employment opportunities almost nonexistent.²¹ These circumstances were not so serious under the prevailing agrarian conditions of the past, when younger generations provided support for aged parents.²² Today, however, a pensioner is usually only as secure as his pension,²³ and such security appears best assured by the strict-contract theory applied by the instant court. Moreover, not all benefits of sound pension plans accrue to the pensioner. Public and private employers increase productivity without the loss of public good will or employee morale by orderly replacement of older employees with younger, more proficient workers.²⁴ Furthermore, a sound pension plan is more likely to attract and hold qualified employees.²⁵

¹⁶ *E.g.*, *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P.2d 799 (1947); *Backenhus v. City of Seattle*, 48 Wash. 2d 695, 296 P.2d 536 (1956).

¹⁷ See, *e.g.*, *York v. Central Ill. Mut. Relief Ass'n*, 340 Ill. 595, 173 N.E. 80 (1930); *Becker v. Faber*, 280 N.Y. 146, 19 N.E.2d 997 (1939); SIMPSON, *CONTRACTS* § 92 (2d ed. 1965).

¹⁸ The court suggested that modification might be possible on a theory of mutual mistake if the pension fund were threatened. Instant case, at 546. Such a case is unlikely to arise, however, due to a statute requiring contributions from municipal funds to keep the pension fund sound. ARIZ. REV. STAT. ANN. § 9-923(A)(10) (1956). The reference to mutual mistake would indicate that a substantial breakdown would be necessary before the contract could be modified. See 3 CORBIN, *CONTRACTS* § 600 (1960).

¹⁹ In 1900, 4.1% of the population of the United States was over sixty-five, by 1950 it was 7.7%. NATIONAL INDUSTRIAL CONFERENCE BD., *HANDBOOK ON PENSIONS* (Studies in Personnel Policy No. 103, 1950).

²⁰ See MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* 3 (1955).

²¹ "By 1952, the percentage of the population age sixty-five and over had more than doubled, but the percentage of the total labor force age sixty-five and over had barely increased." MCGILL, *op. cit. supra* note 20, at 2. See also COHEN, *LABOR IN THE UNITED STATES* 597 (1960).

²² One writer has stated:

In earlier days it was not a matter of particular concern if persons reached old age without adequate means of support. Elderly members of a family resided with and were supported by younger members of the family. . . . With increasing urbanization of society, changes in housing conditions, and many other economic and social developments, the traditional approach to old-age care and support has become outmoded.

MCGILL, *op. cit. supra* note 20, at 5. See GOLDNER, *PENSIONS UNDER COLLECTIVE BARGAINING* 1 (1950).

²³ For a discussion of the importance of pension-plan security see PATTERSON, *LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS* 18-19 (1960).

²⁴ See MCGILL, *op. cit. supra* note 20, at 17; O'NEILL, *MODERN PENSION PLANS* 6 (1947).

²⁵ See MCGILL, *op. cit. supra* note 20, at 18-19. But for an explanation of some disadvantages of pensions see GOLDNER, *op. cit. supra* note 22, at 39-41.

Unfortunately, however desirable the strict-contract theory may be, its adoption gives rise to administrative and legal problems, perhaps the most serious of which is dealing with plans that prove to be financially unsound. The best means of meeting this problem, of course, is to prevent it at the outset by careful and adequate planning. Since this is not always done, it is argued that the legislature should be allowed sufficient flexibility subsequently to improve the plan.²⁶ This flexibility can be at least partially realized in jurisdictions adopting the strict-contract theory by means of accepting it by statute or constitutional amendment. In this manner, a grace period can be provided during which sound plans can be enacted before they become binding contracts. New York has done this by delaying the effective date of a constitutional amendment providing that pension rights vest immediately upon employment.²⁷ This possibility is precluded with judicial adoption of the strict-contract theory. However, regardless of how the theory is adopted, an additional method of dealing with defective plans would be for the legislature to provide some means of keeping them adequately funded despite misjudgments. Arizona has provided for emergency contributions from general funds,²⁸ a result that seems appropriate, since such funds would fulfill past contractual obligations created under a defective plan, while a well-considered, new plan would provide for the future.

A second problem raised by the strict-contract theory is the likelihood that employees will have acquiesced in pension-plan amendments passed subsequent to their employment, thus bringing into issue the doctrines of waiver²⁹ and estoppel. To be estopped, one must have knowingly asserted in the past a right inconsistent with the one presently asserted, and thereby must have induced another to rely on that conduct to his prejudice.³⁰ To constitute a binding election, however, knowledge of the facts is not necessary by one having a choice of alternative rights, if his apparent conduct induces detrimental reliance by the other party.³¹ Therefore, it would seem that, whether a pensioner can claim a pension under a plan other than the one currently in force, depends on whether his conduct under the present plan has induced detrimental reliance by the state.³² The instant court, deciding the issue summarily, held that

²⁶ See, e.g., *Brown v. City of Highland Park*, 320 Mich. 108, 30 N.W.2d 798 (1948); *City of Dallas v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009 (1937).

²⁷ "After July 1, 1940, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. . . . [A]pproval by the people Nov. 8, 1938." N.Y. CONST. art. V, § 7; see 10 SYRACUSE L. REV. 128 (1958).

²⁸ "[P]ursuant to the advice and as recommended by the actuary . . . the governing body shall provide for the payment . . . from the general fund of the municipality." ARIZ. REV. STAT. ANN. § 9-923(A) (10) (1956).

²⁹ "The following distinct and different things have been called 'waiver' . . . (2) An election whereby a party who has a choice of several rights or remedies adopts one and thereby destroys all rights to the others. This is properly called election." 5 WILLISTON, CONTRACTS § 679, at 247 (3d ed. 1961).

³⁰ *Glendale v. Coquat*, 46 Ariz. 478, 52 P.2d 1178 (1935); see RESTATEMENT, CONTRACTS § 90 (1932).

³¹ 5 WILLISTON, CONTRACTS § 685 (3d ed. 1961).

³² See *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419 (1952), which held that accepting benefits under subsequent plans did not induce detrimental reliance by the

plaintiff's acquiescence, by paying contributions which had been increased under the amendment from 2 to 5 per cent, was not alone sufficient to estop him from claiming a pension under the former plan.³³ However, the court also held, again without discussion, that plaintiff was estopped from recovering his payments of the 3 per cent increased contributions.³⁴ To be consistent, the court should have either allowed recovery of the increased contributions or held that the plaintiff was estopped from claiming under the original act. If the instant court could find that the pension board had relied on plaintiff's contributions to the fund and that the fund would be jeopardized by their withdrawal, it would appear that the plaintiff should be estopped from claiming benefits under the former plan.³⁵ However, if the fund was adequately protected by the funding statute and, therefore, no detriment would occur,³⁶ plaintiff should not be estopped to recover his contributions. Little can be done in advance to prevent the problems of waiver and estoppel from arising in other jurisdictions which may follow the instant case in judicially adopting the strict-contract theory. A better approach, it seems, would be to adopt the theory by statute, or by constitutional amendment. These enactments would vest rights in current plans only, and thereby avoid the problem of deciding in which of several past pension plans a pensioner has a vested right. In any event, once the theory of vested rights is adopted, either by the judiciary or by the legislature, employees should be made aware of their rights and be provided with an opportunity to make a definite election when a subsequent amendment is adopted.

A further complication raised by the strict-contract doctrine is the impetus which it may give the state to impose disclaimer clauses allowing the state to modify pensions.³⁷ It may be conceded that the government has a legitimate interest in preserving to itself sufficient flexibility to deal with otherwise unmanageable future liabilities. However, if disclaimer clauses reserve the right to modify at any time, the state could renege on future contributions to the

state; therefore, pensioners were not estopped from claiming benefits under previous plans nor did they waive their rights under those plans.

³³ Instant case at 546.

³⁴ *Ibid.* The dissent found this aspect of the majority opinion particularly vulnerable, saying:

If [the plaintiff] . . . is to be controlled by the strict "contract" terms of the 1937 Act, certainly he is entitled to a refund of that portion of his contribution which exceeded 2% of his salary. He would be entitled to a refund, perhaps with interest, of 3% of his contributions since 1952. If he is not estopped to claim benefits under the 1937 Act in 1962, it should logically follow that he is not estopped from claiming he paid 3% too much for ten years ending in 1962 when he retired. The majority, apparently recognizing this situation, did not want the strict contract thesis approach applied after all.

Id. at 550.

³⁵ The court did suggest that facts might exist from which estoppel or waiver could be implied. Since no such facts were asserted at trial, leave was given to amend to set up such facts. Instant case at 546-47.

³⁶ See note 18 *supra*.

³⁷ A disclaimer clause has been defined as that which "negates or limits the effect of other promissory language . . ." PATTERSON, *op. cit. supra* note 23, at 64. See generally Annot., 42 A.L.R.2d 461 (1955).

pension fund and on ultimate payment of benefits.³⁸ Indeed, in one jurisdiction it has been held that under such a clause a pension board could refuse a public employee a pension altogether.³⁹ This harsh result can be avoided by employing the rationale, applied to some private pension decisions, that disclaimers do not affect retired public employees.⁴⁰ A restricted disclaimer would be useful to allow the state needed flexibility to modify pension plans in case of a major unforeseeable circumstance such as a severe depression. Strict-contract pensions which have been carefully planned to include such clauses along with adequate funding provisions will insure the pensioner an adequate pension while allowing the state sufficient flexibility to adjust the pension plan to keep it financially secure.

J.W.C.

Strict Liability in Tort Rejected as Basis for Recovery of Economic Losses Resulting From Defective Product

Plaintiff purchased a new truck to use in his one-truck business. The manufacturer expressly warranted the truck to be free from defects, but it developed a violent bouncing which neither the seller nor the manufacturer could remedy. The plaintiff alleged both breach of warranty and strict liability in tort in his suit against the manufacturer to recover the purchase price and lost business profits resulting from the truck's poor performance. Plaintiff recovered in the trial court, and on appeal the California Supreme Court *held*, affirmed. Economic losses unassociated with personal injuries caused by a defective product are compensable under breach of warranty, but such losses cannot be recovered on a theory of strict liability in tort. *Seely v. White Motor Co.*, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

The application of strict liability in tort to product liability cases was first judicially advocated by Justice Traynor of California in a concurring opinion in *Escola v. Coca Cola Bottling Co.*,¹ in which he urged that manufacturers be held absolutely liable for personal injuries caused by products with latent defects. He reasoned that the adoption of strict liability in tort would greatly ease the injured plaintiff's burden of proof which often presented obstacles in a negligence or warranty action. Justice Traynor reiterated his position in a

³⁸ See PATTERSON, *op. cit. supra* note 23, at 64-65.

³⁹ *Pritchard v. Board of Comm'rs*, 211 Ga. 57, 84 S.E.2d 26 (1954). Disclaimer clauses in private pension plans are usually held to be valid. See, *e.g.*, *Menke v. Thompson*, 140 F.2d 786 (8th Cir. 1944); *Magee v. San Francisco Bar Pilots Benevolent & Protective Ass'n*, 88 Cal. App. 2d 278, 198 P.2d 933 (Dist. Ct. App. 1948); *Umshler v. Umshler*, 332 Ill. App. 494, 76 N.E.2d 231 (1947). But if a clause disclaims any vesting of pension rights, a minority of courts nullifies the clause and allows the pension to vest on retirement. *Schofield v. Zion's Co-op. Mercantile Institution*, 85 Utah 281, 39 P.2d 342 (1934). However, in a majority of private plans, disclaimer clauses themselves vest the pension on retirement. PATTERSON, *op. cit. supra* note 23, at 68.

⁴⁰ See *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385 (1936); *Schofield v. Zion's Co-op. Mercantile Institution*, 85 Utah 281, 39 P.2d 342 (1934).

¹ 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion). "[A] manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Ibid.*

succession of concurring opinions² and his views were finally adopted by the court in *Greenman v. Yuba Power Prods., Inc.*³ The adoption of this new remedy for the consumer personally injured by defective products was unprecedented. Recently the *Greenman* doctrine was extended in New Jersey in *Santor v. A. & M. Karagheusian, Inc.*,⁴ to permit recovery of "loss of bargain" unassociated with personal injuries.⁵

In the instant case, the court granted recovery on the basis of breach of warranty; however, the main import of the decision is the pronouncement by Justice Traynor regarding the scope of strict liability in tort. In his opinion, Traynor stated that strict liability in tort would be applied only where there is proof of personal injury caused by a defectively manufactured product. Justice Peters, dissenting, characterized Traynor's discussion of strict liability in tort as an "advisory opinion"; however, he expressly stated that he could not allow the dicta to go unchallenged, even though his objections would in no way alter the extent of recovery.⁶ The dissent took the position that the applicability of strict liability in tort should be based on whether the purchaser of the defective product was an "ordinary consumer," that is, one who had insufficient bargaining power to negotiate realistically with the seller for warranties, disclaimers, and limitation-of-damage provisions.

The instant case did not change the state of the law in California. It did, however, define the limits of the recently adopted *Greenman* doctrine by con-

² *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 350, 353 P.2d 575, 583, 5 Cal. Rptr. 863, 871 (1960); *Trust v. Arden Farms Co.*, 50 Cal. 2d 217, 235, 324 P.2d 583, 594 (1958); *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 523, 203 P.2d 522, 528 (1949). See also Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. REV. 281, 283 n.15 (1961); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 943-44 (1957); 15 STAN. L. REV. 381, 388 n.27 (1963).

³ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

⁴ 44 N.J. 52, 207 A.2d 305 (1965). In the *Santor* case, the plaintiff purchased carpet which he knew was nationally advertised and which the retailer represented as grade 1. It developed unusual lines of discoloration and the New Jersey court held the manufacturer liable to the remote consumer because of a breach of an implied warranty of merchantability. In abandoning privity, the court followed its earlier precedent of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), and *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), was cited as authority in support of granting recovery of commercial losses unaccompanied by personal injuries in a breach of warranty action. The court then suggested that the plaintiff's action could be cast in the more simple form of strict liability in tort as espoused in *Greenman* and as adopted in *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (dictum). While both of these cases dealt with personal injuries, the *Santor* court went one step further and extended this principle to situations where only commercial losses were involved. There are no other cases which have extended strict liability in tort to that extent. The actual holdings of *Santor* and *Randy Knitwear* are in accord with the holding of the instant case since, in all three, recovery for economic losses was granted on the basis of breach of warranty. The clash between *Santor* and the instant case arises in the dicta of both cases concerning what damages are recoverable in an action based on strict liability in tort.

⁵ Ordinarily, there are three kinds of damages in defective-product cases: (1) injury to the person, (2) property damage, and (3) loss of business profits. The term "loss of bargain" was used by the *Santor* court to describe the damages suffered by the buyer when his carpet developed unusual lines of discoloration; it probably includes both property damage and loss of business profits.

⁶ Instant case at 152-53, 45 Cal. Rptr. at 24-25.

fining strict liability in tort to personal injury cases.⁷ The instant case and *Santor* appear to be the only cases to discuss the application of the doctrine of strict liability in tort to allow recovery when a defective product causes a "loss of bargain." The dicta of the two cases are diametrically opposed: *Santor* sanctioned strict liability in tort in nonpersonal injury cases while the instant case disapproved *Santor* and refused to apply the doctrine in absence of personal injuries. This dichotomy which developed in two highly influential courts provides other jurisdictions with alternative approaches in situations where defective products cause only the "loss of bargain."⁸

Traynor's concept that the availability of strict liability in tort should be determined by the kind of damages sustained by the user of a defective product is very persuasive. When personal injuries are involved, the plaintiff should be able to sue on a theory of strict liability in tort because it increases the likelihood of recovering the often overwhelming losses associated with such injuries. This promotes the public policy, espoused in *Greenman*, of distributing the expenses of personal injuries throughout the public as one of the costs of doing business. On the other hand, when only economic damages are involved, the manufacturer and user have interests of more comparable value and, thus, sales law is appropriate because it endeavors to apportion fairly the commercial risks. According to Justice Traynor, "although the rules governing warranties complicated resolution of the problems of personal injuries, there is no reason to conclude that they do not meet the 'needs of commercial transactions.'"⁹

The law of sales with its provisions designed to preserve the freedom of contract is of great utility in the area of commercial bargaining.¹⁰ Such freedom

⁷ In a personal injury action, if the plaintiff were to recover on a theory of strict liability in tort, he could also recover property damage and all other consequential damages which resulted proximately from the defective product. See instant case at 153-54, 45 Cal. Rptr. at 25-26 (dissenting opinion); CAL. CIV. CODE § 3333. If only property damage were involved, Traynor suggested that strict liability in tort might also be available. Instant case at 152, 45 Cal. Rptr. at 24.

⁸ In the area of product liability, strict liability in tort has been directly discussed and adopted in very few cases other than *Greenman* and *Santor*. See *Delany v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964); *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (dicta); *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965). See generally RESTATEMENT (SECOND), TORTS § 402A (1965); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

However, many courts have provided practically the same remedy by modifying statutory sales warranties. See, e.g., *Connolly v. Hagi*, 24 Conn. Super. 198, 188 A.2d 884 (Super. Ct. 1963); *Browne v. Fenestra, Inc.*, 375 Mich. 566, 134 N.W.2d 730 (1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 158, 161 A.2d 69 (1960); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960); cf. *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959). But see, e.g., *Kuschy v. Norris*, 25 Conn. Super. 383, 206 A.2d 275 (Super. Ct. 1964); *Hahn v. Ford Motor Co.*, 126 N.W.2d 350 (Iowa 1964); *Payne v. Valley Motor Sales, Inc.*, 146 W. Va. 1063, 124 S.E.2d 622 (1962).

⁹ Instant case at 150, 45 Cal. Rptr. at 22.

¹⁰ See UNIFORM COMMERCIAL CODE §§ 2-313 to -318, -607, -719. The following provisions enable the buyer to protect his interests: (1) express warranty, that is, any representation which forms the basis of the bargain, § 2-313, (2) implied warranties of merchantability and fitness, §§ 2-314 to -315, and (3) extension of warranties to the

is desirable in a free-enterprise economy and should be maintained in order to further the interests of the marginal firm that is forced to keep its risks low, of the buyer who purchases at low prices relying on his own judgments, and of enterprises that market new and experimental products. It is essential that liability attach for the failure of a product to meet the seller's or manufacturer's representations, but, where representations are limited or disclaimed in a bargained-for contract of sale, such restrictions of the seller's or manufacturer's liability should be implemented.

In those states where the Uniform Commercial Code has been adopted,¹¹ it is intended to be the sole and exclusive law governing commercial transactions;¹² its purpose is to preempt the field and, thereby, insure uniformity and predictability.¹³ Strict liability in tort, as restricted by the instant case, is entirely consistent with this policy of preemption because it does not impede commercial dealings — it is concerned with recovery of damages for personal injuries only.¹⁴ On the other hand, the *Santor* decision hinders the operation of the Uniform Commercial Code provisions by weakening the effect of disclaimers and by nullifying the requirement of notice of defect.¹⁵ The instant case appears to safeguard the freedom of contract in commercial dealings and grants full recognition to the legislatively approved policies of the Uniform Commercial Code.

immediate household of the buyer, § 2-318. On the other hand the following provisions enable the seller to reduce his risks: (1) disclaimers of liability, § 2-316, (2) requirement of notice of defect, § 2-607, and (3) contractual modification of remedies available, § 2-719. Compare UNIFORM SALES ACT §§ 12-16, 49, 69 (1906). But see *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 389-90, 161 A.2d 69, 86-87 (1960); VOLD, SALES § 91 (2d ed. 1959). Compare Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1130-33 (1960).

¹¹ Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965), lists forty-two jurisdictions as having adopted the Uniform Commercial Code.

¹² UNIFORM COMMERCIAL CODE, §§ 1-102, comment, -104, comment; see *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 382, 385 (Ky. 1961).

¹³ "(2) Underlying purposes and policies of this act are . . . (c) to make uniform the law among the various jurisdictions." UNIFORM COMMERCIAL CODE § 1-102(2)(c).

¹⁴ The Uniform Commercial Code, like *Greenman*, does not permit limitation of damages when personal injuries are involved, but, like the instant case, the code does permit such limitations when only commercial losses are involved.

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

UNIFORM COMMERCIAL CODE § 2-719(3).

¹⁵ The *Santor* court specifically held that *Henningsen* should apply when economic losses are unassociated with personal injuries. While this may include only *Henningsen's* abandonment of privity, it probably also includes *Henningsen's* voiding of disclaimers because the *Santor* court referred to its result as being strict liability in tort similar to the *Greenman* doctrine which does not permit the manufacturer to contractually modify his liability. The *Santor* court further declared that notice and election of remedy provisions of the sales laws have no relevance in an action by a consumer against a manufacturer. Many jurisdictions have approved of the *Henningsen* rationale and holding, and, consequently, may follow the *Santor* case in extending sales warranties, modified to meet the needs of injured consumers, into the area of purely commercial transactions. E.g., *Picker X-ray Corp.*, 185 A.2d 919 (D.C. Munic. Ct. App. 1962); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965); *Morrow v. Caloric Ap-*

Justice Peters in his dissent¹⁶ was in agreement that sales law should have exclusive application in some situations, but he disagreed sharply with the majority regarding the occasions when it should be given complete priority. He reasoned that the rationale of *Greenman* required the availability of strict liability in tort to the "ordinary consumer" who was "powerless to protect himself." He asserted that economic losses should be recoverable under the *Greenman* doctrine whenever a consumer is left no alternative but to submit to the disclaimer or limitation-of-damage provisions prepared by the manufacturer. This "equality" or "inequality" in bargaining position, however, is a concept foreign to strict liability in tort and should not be used as the standard for expanding the *Greenman* doctrine. Justice Peters' standard would also leave the law governing sales transactions unpredictable because, as he admits, the definition of an "ordinary consumer" would require a case-by-case determination.¹⁷ After judicial definition of the concept of "ordinary consumer" the unpredictability would still remain, since the factual question of whether the parties were in an "equal bargaining position" could only be resolved in a particular case by the trier of fact. The *Santor* court intimated that disclaimers, which the court had previously declared void as against public policy when the parties to a contract are in an unequal bargaining position,¹⁸ may be void regardless of the nature of the injuries. If so, their validity would also depend upon the difficult determination of equality of bargaining position. This would lead to uncertainty in the law and to increased litigation, because the consumer could not effectively determine if the manufacturer's disclaimers were valid until the trier of fact evaluated their relative bargaining strength. For the same reason the manufacturer who was relying on a limitation-of-damage provision could not ascertain the strength of his position when bargaining for settlement. The dissent's position might also cause manufacturers to increase prices due to the uncertainty surrounding the status of "ordinary consumers" who would not be bound by disclaimers. Thus, the manufacturer's freedom of contract, sought to be preserved by the Uniform Commercial Code,¹⁹ would be further restricted.

The courts in some cases have labeled the abandonment of privity as "strict liability,"²⁰ and, subsequently, these cases have erroneously been cited as prece-

pliance Corp., 372 S.W.2d 41 (Mo. 1963); cf. *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *King v. Douglas Aircraft Co.*, 159 So. 2d 108 (Fla. Dist. Ct. App. 1964); *Suvada v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N.E.2d 313 (Ill. Ct. App. 1964); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). See generally Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1, 112-15 (1963); Rapson, *supra* note 11.

¹⁶ Instant case at 152, 45 Cal. Rptr. at 24.

¹⁷ *Id.* at 158, 45 Cal. Rptr. at 30.

¹⁸ This was previously done in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See *Santor v. A. & M. Karagehussian, Inc.*, 44 N.J. 52, 63-64, 207 A.2d 305, 311 (1965).

¹⁹ UNIFORM COMMERCIAL CODE § 1-102(3), comment 2.

²⁰ *E.g.*, *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

dent for adopting the *Greenman* strict liability in tort doctrine.²¹ Prosser, as reporter for the *Restatement of Torts (Second)*, encouraged the American Law Institute to adopt a section reflecting the new trend toward strict liability in tort in personal injury cases.²² As proof of the presence of such a trend he cited breach-of-warranty cases where recovery was granted in the absence of privity.²³ A number of courts by way of dicta have rationalized this intermixing of authority by maintaining that sales warranty stripped of privity, notice, disclaimers, and other sales law requirements is equivalent to strict liability in tort.²⁴ While this may be true, it seems that courts should directly adopt strict liability in tort rather than seek the same end by drastically modifying the law of sales. The justification for any judicial modification of the sales provisions should be based on policy considerations governing sales transactions, while the judicial adoption of strict liability in tort should be based on the different considerations governing personal injuries. The instant case helps to separate the law governing commercial transactions and the law governing personal injuries; this will help to avoid such problems as the current confusion of abandonment of privity with strict liability in tort and, consequently, will promote greater clarity in both areas of the law.

By clearly separating strict liability in tort from sales law the instant case may have provided the impetus for courts to reevaluate the question whether privity should be abandoned and the extent to which other sales provisions should be strictly construed. If this were done in California it might have the effect of giving new strength to the attenuated sales-warranty provisions.²⁵

²¹ *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (dictum).

²² See comments and cases cited in *RESTATEMENT (SECOND), TORTS* § 402A (Tent. Draft No. 10, 1964).

²³ *Ibid.* Of the thirty-eight cases cited only three are related to strict liability in tort and the others are basically related to the movement to abandon privity. Nevertheless, three *Erie* bound federal courts have adopted strict liability in tort relying heavily on the *Restatement* as authority for what the state courts are doing. See *Delany v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964); *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

²⁴ *E.g.*, *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).

Without attempting an exhaustive explanation, it may fairly be said that [strict liability in tort] . . . is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect and limitation through inconsistencies with express warranties.

Greeno v. Clark Equip. Co., *supra* at 429.

²⁵ While California has construed the privity and disclaimer provisions strictly against the manufacturer, *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954) (no personal injuries involved), much of the impetus for the movement has come from the court's efforts to remove all obstacles preventing a consumer who has suffered personal injuries from recovering. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939). Now that sales law is to be applied only in situations where personal injuries are not involved, courts may distinguish previous strict constructions as applying only in per-

While there may be some question regarding the propriety of an advisory opinion in the instant case, it is a valuable guide in clarifying many problems in the area of seller's and manufacturer's liability for defective products.

W.V.B.

Removal-of-Director Requirements of Corporate Charter Held Controlling Despite New Corporation Law

At a special stockholders' meeting of a Utah corporation, a majority of the outstanding shares was voted to remove the directors. Since the number of votes cast was less than the number required for removal under the articles of incorporation, the directors refused to resign. The stockholders who requested the special meeting petitioned for an order requiring the directors to show cause why they should not be removed. The shareholders contended that the recently enacted Model Business Corporation Act had altered the corporate charter so that only a majority vote of all outstanding shares was required to remove the directors. The trial court dismissed the petition, and on appeal, the Utah Supreme Court *held*, affirmed. The removal-of-director provisions of the corporate charter are controlling. The court stated that the model act may not alter the charter removal provisions because the federal constitution forbids state impairment of contract obligations. *Jacobson v. Backman*, 16 Utah 2d 356, 401 P.2d 181 (1965).

Although the state has broad power to regulate corporations, its authority is subject to some constitutional limitations.¹ Before extensive use was made of the due process clause as a restraint on state power,² the United States Supreme Court, beginning with *Trustees of Dartmouth College v. Woodward*,³ developed the "contract theory" as a limitation on state authority to enact laws that regulate existing corporations. Under the "contract theory," the articles of incorporation together with the laws in effect at the date of incorporation constituted a contract between the state and the corporation,⁴ and any attempt by

sonal injury cases and allow more liberal constructions of provisions when recovery of loss of bargain is sought. See Ezer, *supra* note 2; Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262 (1964).

¹ HENN, CORPORATIONS § 93 (1961).

² State authority over corporations is subject to the requirements of due process. *Munn v. Illinois*, 94 U.S. 113 (1877).

³ 17 U.S. (4 Wheat.) 518 (1819). For cases extending the doctrine to private business corporations, see *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), and *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830).

⁴ *Charles River Bridge v. Warren Bridge*, *supra* note 3; *Providence Bank v. Billings*, *supra* note 3; LATTIN, CORPORATIONS 495-96 (1959); Legislative Reference Service, Library of Congress, *The Constitution of the United States of America*, S. Doc. No. 39, 88th Cong., 1st Sess. 390-91 (1964). The notion that the contract incorporates the laws of the state is not peculiar to the corporate charter contract, but applies to all contracts. *Id.* at 381-82; see *Northwest Steel Rolling Mills, Inc. v. Commissioner*, 110 F.2d 286, 289 (9th Cir.), *rev'd*, 311 U.S. 46, 51 (1940). The significant holding of the *Dartmouth College* case was that the corporate charter was a contract.

the state to alter this charter contract was deemed an unconstitutional impairment of contract obligations⁵ unless the change was made pursuant to the state's police power.⁶

To avoid the restrictive effect of the "contract theory," many states, including Utah,⁷ adopted constitutional provisions which reserved to the state the power to alter corporate charters. However, in 1907 the Utah Supreme Court, in *Garey v. St. Joe Mining Co.*,⁸ severely restricted the state's reservation of power by refusing to apply, on the basis of the "contract theory," a statute that purported to alter charter voting requirements.⁹ The court distinguished between those charter provisions that are a contract between the corporation and its stockholders and those that are a contract between the state and the corporation. The *Garey* court held that the state's reservation-of-power clause authorizes alteration of only those charter provisions that are a contract between the state and the corporation.¹⁰ The court further limited the state's reserve power by requiring that the alteration be for the benefit of the state or public.¹¹ Later Utah cases,¹² however, seem to reject the *Garey* case and adopt the United States Supreme Court¹³ and majority position¹⁴ that a state

⁵ *Ibid.*

⁶ LATTIN, CORPORATIONS 495-96; see *Denver & R.G.R.R. v. City & County of Denver*, 250 U.S. 241 (1919); *Great No. Ry. v. Minnesota ex rel. Clara City*, 246 U.S. 434 (1918); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877). Regulation pursuant to the state's police power, as used by these authorities, means that which was necessary for the protection of public safety, health, or morals. This is to be distinguished from the broad meaning of the term which is the total of all state powers. *E.g.*, *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 163 Pac. 1024, 1032 (1917); *Sieber v. Laawe*, 33 N.J. Super. 115, 109 A.2d 470, 476 (Super. Ct. 1954).

⁷ UTAH CONST. art. XII, § 1, provides that "All laws relating to corporations may be altered, amended or repealed by the Legislature . . ." Most other states have enacted similar provisions in either their constitutions or codes. HENN, CORPORATIONS § 340, at 529 (1961).

⁸ 32 Utah 497, 91 Pac. 369 (1907).

⁹ The statute in the *Garey* case allowed amendment of the articles by a smaller portion of the stockholders than was required by the articles. Thus, it seems to make no difference whether the new statute has the effect of directly altering the articles or merely allowing a different portion of the stockholders to alter the corporation's articles. In either case, the charter is altered. *Cf.* HENN, CORPORATIONS § 340, at 529 n.11 (1961).

¹⁰ [T]he right [to alter the charter under the reservation-of-power clause] is reserved for the benefit of the state and of the public and for public purposes. . . . [The state] cannot, however, reach out and impair the obligations of contracts existing between the corporation and its members, or among the incorporators themselves, any more than it can impair the obligations of contracts existing between other individuals.

32 Utah at 512, 91 Pac. at 374.

¹¹ *Ibid.*

¹² The Utah court in *Cowan v. Salt Lake Hardware Co.*, 118 Utah 300, 304, 221 P.2d 625, 627 (1950), stated that "constitutional and statutory provisions authorizing amendments of Articles of Incorporation do not only pertain as to the relationship between the state and corporation, but pertain to the rights between the corporation and its stockholders." Also, referring to the constitutional reservation-of-power clause, the court in *Keetch v. Cordner*, 90 Utah 423, 428, 62 P.2d 273, 276 (1936), stated, "[I]n legal effect, the signers of the original articles of incorporation agreed that they may thereafter be amended in conformity with law." *Accord*, *Weede v. Emma Copper Co.*, 58 Utah 524, 200 Pac. 517 (1921).

¹³ The Supreme Court, in *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634 (1936), stated, "The reservation of power to amend is a part of the contract between the State and the corporation and therefore § 10 of Art. I [contract clause] of the Federal

reservation-of-power clause eliminates any restraint imposed by the contract clause of the federal constitution.

The court in the instant case disregarded these later cases and reaffirmed the *Garey* rationale. The corporate charter in the instant case required that fifty-one per cent of the outstanding stock be represented in order to constitute a quorum¹⁵ and a two-thirds' vote of the stock represented at the meeting be cast in favor of removal.¹⁶ Thus, it was mathematically possible under the charter that a vote of little more than one-third of the outstanding stock could remove directors.¹⁷ Asserting this hypothetical possibility, the stockholders claimed that the charter removal provisions were invalid because the new Utah corporation law requires a minimum vote of a majority of the outstanding shares to remove directors.¹⁸ Although the court held that the charter was controlling, it stated that, even if the stockholders' interpretation of the new law based on the hypothetical situation were correct, the legislature, under the "contract theory," could not constitutionally alter the removal-of-director provisions of existing corporate charters.¹⁹ In reaching this conclusion, the court expressly relied on the decision in the *Garey* case on the effect of a reservation-of-power clause.

Garey and the instant court specified two conditions that must be met before the legislature, pursuant to the state's reserve power, may alter charter provisions of existing corporations. The first condition is that the alteration be made only when there is sufficient public interest.²⁰ Although the Utah courts

Constitution does not apply." However, this position, according to some authorities, only applies to corporations formed after a reservation-of-power clause was adopted by the state. See LATTIN, CORPORATIONS 501 (1959).

¹⁴ *E.g.*, *Lord v. Equitable Life Assur. Soc'y*, 194 App. Div. 212, 87 N.E. 443 (1909); *Winfree v. Riverside Cotton Mills Co.*, 113 Va. 717, 75 S.E. 309 (1912); LATTIN, CORPORATIONS 501 (1959).

¹⁵ The articles of the corporation did not specify the quorum requirements; therefore, the statute which specified a majority quorum when the articles were silent was incorporated into the corporate charter and was controlling. Utah Laws 1896, ch. 87, § 2285, at 306.

¹⁶ Instant case at 357, 401 P.2d at 183.

¹⁷ The lowest percentage of shares that could possibly remove the directors under the charter in the instant case would be two-thirds of 51% or 34%.

¹⁸ Brief for Appellant, pp. 5-8; see UTAH CODE ANN. §§ 16-10-37, -136 (Repl. vol. 1962).

The appellants' argument consisted of two parts: First, the charter removal provision was invalid under the new law. Second, therefore, § 37, which specifies that a majority vote is required to remove directors in the absence of an article provision requiring a greater proportion, should be controlling.

¹⁹ The court did not decide whether the removal provisions were invalid under the model act; thus, its discussion on the constitutionality of the provisions of the new act, as applied to corporations in existence at its adoption, would appear to be dictum. Since the court could have reserved decision on the constitutional issue until an actual minority had complied with the charter rather than basing its decision on a hypothetical possibility, the court's discussion was unnecessary. In such a situation, a court should never invalidate state legislation on constitutional grounds unless the mere existence of the regulation may restrain the exercise of some constitutional right. See, *e.g.*, *Neese v. Southern Ry.*, 350 U.S. 77 (1955) (per curiam); *Alder v. Board of Educ.*, 342 U.S. 485 (1952); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Muskat v. United States*, 219 U.S. 346 (1911).

²⁰ Instant case at 358, 401 P.2d at 183; *Garey v. St. Joe Mining Co.*, 32 Utah 497, 512, 91 Pac. 369, 374 (1907).

did not specify criteria, sufficient public interest is normally shown by establishing that the new regulation was made pursuant to a valid state function and that the regulation is reasonable.²¹ The provisions of the model act seem to meet these criteria since there appears to be a rational relationship between the requirements of the new regulation and the state's sovereign function of regulating corporations.²² The second and more difficult obstacle is to show that the charter provision that the new law purports to alter is a part of the contract between the state and the corporation. Although the reasoning used by the Utah courts was not made clear, it appears that the courts' approach is to separate the charter into two contracts: a contract between the state and the corporation and a contract between the corporation and its stockholders.²³ The latter contract is said to include all charter provisions that create rights and duties between the stockholders, the directors, and the corporation. Apparently, the state's contract includes all other provisions, and, therefore, it has the authority under its reserve power to alter such other provisions.²⁴

²¹ East N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 872-92 (1944); see Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Whether or not the statute is reasonable is normally said to depend upon whether there is a rational connection between the statute and a valid state function. See *ibid.* A variation on the test for finding sufficient public interest is to balance the state's interest in performing its sovereign function against the interests of private individuals in having the terms of their contracts not impaired. *Ibid.* However, in East N.Y. Sav. Bank v. Hahn, *supra*, the Supreme Court stated:

[W]hen a widely diffused public interest [such as that in the economic power of corporations, Note, *Limitations on the Amending Power of the Corporate Contract*, 18 U. CHI. L. REV. 139 (1950)] has become enmeshed in a network of multitudinous private arrangements, the authority of the State . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

Id. at 232. On the other hand, by the term "public benefit," the Utah court may have meant "necessary for the protection of safety, health, or morals." See Note, *Power of the State To Alter Corporate Charters*, 31 COLUM. L. REV. 1163, 1167 n.24 (1931); note 7, *supra*. If this is the interpretation intended by the court, it is submitted that most all provisions in the new Utah Business Corporation Act will be restricted from applying to corporations formed before the adoption of the act.

²² All provisions in the Utah Business Corporation Act pertain to regulating corporate matters, and corporate regulation is a valid function of the state. With respect to the removal provisions in question in the instant case, there appears to be a rational basis for requiring at least a majority vote to remove. Under the old law it was possible for a disgruntled minority to abuse the power of removal by tying up corporate action with constant removals.

²³ Instant case at 358, 401 P.2d at 183; Garey v. St. Joe Mining Co., 32 Utah 497, 512, 91 Pac. 369, 374 (1907).

²⁴ *Ibid.* The Utah courts' language was to the effect that the state could not alter, modify, or change the contractual rights and relationship of the shareholders and the corporation. This seems to be substantially different from the language used by most other courts which have relied on the two-contract distinction. These other courts have used the contract argument to restrict the application of new statutes which would effect an extraordinary or fundamental change in "corporate matters." See Snook v. Georgia Implement Co., 83 Ga. 61, 9 S.E. 1104 (1889); Intiso v. Metropolitan Sav. & Loan Ass'n, 69 N.J.L. 588, 53 Atl. 206 (Sup. Ct. 1902); Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946). These courts defined a fundamental or extraordinary change as one which at common law required the unanimous consent of the stockholders or a change that actually created a new corporation. The cases cited by the Utah courts were early cases that did not make a distinction between minor alterations and those which made an extraordinary change. Thus, under the definition of an extraordinary or fundamental change, requiring a majority to remove directors would not be included. The Garey case has been cited for the proposition that it imposed a much greater restraint

Under this theory, however, the state may not change the corporation and shareholder contract because it is not a party thereto.²⁵ Such an unauthorized change could either create or alter rights and duties between the stockholders, the directors, and the corporation.²⁶

If the rationale underlying both *Garey* and the instant case is carried to its logical extreme, many important provisions in the new Utah corporation law that might have altered existing corporate charters would be considered inapplicable to corporations formed before the adoption of the new act.²⁷ For example, several provisions of the new law provide additional safeguards for the protection of stockholders by allowing them to dissolve the corporation,²⁸ by giving stockholders who dissent to merger or consolidation the right to exchange their stock for fair market value,²⁹ or by liberalizing the stockholders' rights to inspect corporate books and records.³⁰ Other new provisions limit the likelihood of minority stockholder control by increasing the minimum vote to remove directors to a majority of the outstanding shares.³¹ Still other sections of the new act are designed to reduce present requirements for stockholder action, such as the model-act provisions that purport to allow as little as a majority to change the fundamental purpose of the corporation³² or permit ten per cent to bring a special meeting and propose article amendments.³³ Such provisions as these enhance the value of the shareholder's interest and protect his position in the modern corporate structure. Furthermore, several new provisions modify or enlarge the powers of the directors, such as those permitting them to revise and restate the articles of incorporation,³⁴ to set their own salaries,³⁵ to promulgate bylaws,³⁶ and to abrogate shareholders' preemptive

on the state's reserve power than was done by those courts that adhered to the fundamental or extraordinary change rule. Note, *Power of the State To Alter Corporate Charters*, 31 COLUM. L. REV. 1163, 1167 n.24 (1931).

²⁵ Instant case at 358, 401 P.2d at 182; *Garey v. St. Joe Mining Co.*, 32 Utah 497, 512, 91 Pac. 369, 374 (1907).

²⁶ The imposition of a new duty under the corporate charter would appear to be just as much an alteration as the modification of an existing duty.

²⁷ The initial determination that must be made in every case is whether or not the provisions in the new act purport to alter the charter. Many provisions that pertain to shareholders' rights require a minimum vote but allow a higher percentage vote if the articles so require. In such a situation, although the new act sets a higher minimum, the articles may require a percentage vote that meets both the requirements of the old and the new acts; thus, the new act would not alter the charter in such a case.

²⁸ UTAH CODE ANN. § 16-10-78 (Repl. vol. 1962); see UTAH STATE BAR, A PROPOSED UTAH BUSINESS CORPORATION ACT 105 (1957).

²⁹ UTAH CODE ANN. § 16-10-76 (Repl. vol. 1962).

³⁰ UTAH CODE ANN. § 16-10-47 (Repl. vol. 1962).

³¹ Compare UTAH CODE ANN. §§ 16-10-37, -136 (Repl. vol. 1962), with Utah Laws 1896, ch. 87, § 2285, at 306. The quorum minimum has also been increased. UTAH CODE ANN. § 16-10-25 (Repl. vol. 1962); see Note, *The Transition to the Model Business Corporation Act in Utah*, 9 UTAH L. REV. 689, 691-93 (1965).

³² UTAH CODE ANN. §§ 16-10-55(d), -54(c) (Repl. vol. 1962); see UTAH STATE BAR, *op. cit. supra* note 28, at 71.

³³ UTAH CODE ANN. § 16-10-55(b) (Repl. vol. 1962); see UTAH STATE BAR, *op. cit. supra* note 28, at 74.

³⁴ UTAH CODE ANN. §§ 16-10-60, -61 (Repl. vol. 1962).

³⁵ UTAH CODE ANN. § 16-10-33 (Repl. vol. 1962); see UTAH STATE BAR, *op. cit. supra* note 28, at 43.

³⁶ UTAH CODE ANN. § 16-10-25 (Repl. vol. 1962).

rights.³⁷ Moreover, the Utah act purports to impose new obligations on the corporation. For instance, a list of the stockholders entitled to vote must be made available to the shareholders in advance of a meeting.³⁸ If these provisions are restricted on the basis of *Garey* and the instant case, the legislature's attempt to safeguard the stockholders' interests while providing modern and streamlined rules for managing corporations will be frustrated with respect to corporations in existence at the adoption of the act.

There are many practical problems created by restricting the new law on the basis of the "contract theory." The question of whether the new act or a repealed law controls in any situation will create a great deal of uncertainty in Utah corporation law.³⁹ Because new powers and duties are given to the directors by the new law, this uncertainty will pose many difficult management problems for directors of corporations formed before the adoption of the act. Purchasers of stock may suffer since they may not acquire all the rights that the published corporation laws purport to give stockholders.⁴⁰ Moreover, a burden of administering different and conflicting corporation laws will be imposed on both the courts and the legal profession. The cases that developed the "contract theory" and the limitations on the state's reserve power involved amendments to a single statute that applied to one specific corporation or narrow class of corporations.⁴¹ Hence, little administrative burden or uncertainty was created when the courts restricted these statutes. However, when the problem is multiplied by the number of provisions in a comprehensive enactment, such as the model act, which purport to apply to all corporations,⁴² the burden as well as the uncertainty is substantially increased.⁴³

³⁷ UTAH CODE ANN. § 16-10-24 (Repl. vol. 1962). See also Note, 9 UTAH L. REV. 689, 691 (1965).

³⁸ UTAH CODE ANN. § 16-10-47 (Repl. vol. 1962).

³⁹ It will never be absolutely certain whether a provision in the new law is controlling until the court has reviewed it. Prior to the passage of the Model Business Corporation Act, Utah corporation law was filled with uncertainties. Dykstra, *Gaps, Ambiguities and Pitfalls in the Utah Corporation Code*, 4 UTAH L. REV. 439 (1955). The passage of the model act, according to one writer, remedied the uncertainty in Utah law. Note, 9 UTAH LAW REV. 689, 704 (1965). However, if the Utah court follows the instant case, the problem of uncertainty will be greater than before the passage of the model act.

⁴⁰ A difficult question with respect to the rights of original purchasers, as distinguished from one who purchases stock from another stockholder, is posed by a literal interpretation of the "contract theory." Under the "contract theory," the law that is in effect at the date the contract is entered into becomes a part of the shareholder's contract. If a newly formed corporation issues part of its stock, the legislature then revises the law, and the corporation subsequently issues the remainder of its stock, a literal interpretation of the theory would mean that shareholders in the same corporation would have their interests governed by different and conflicting laws. In a suit to determine the rights of these original purchasers, the court would have a difficult decision to determine which law is controlling.

⁴¹ See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Zabriskie v. Hackensack & N.Y.R.R.*, 18 N.J. Eq. 178 (Ch. 1867).

⁴² Section 140 of the model act states that the provisions of the act will apply to existing corporations in states having a reservation-of-power clause. The Utah commissioners recommended the deletion of § 140 "because of the provisions of the State Constitution, Section 1, Article 12 [the reservation-of-power clause]." UTAH STATE BAR, *op. cit. supra* note 28, at 160. It seems that the commissioners were of the opinion that § 140 was unnecessary in view of the Utah cases since *Garey*. See note 12 *supra*. Regardless of the commissioners' suggestion, the Utah Legislature enacted § 140 without substantial qualification. UTAH CODE ANN. § 16-10-140 (Repl. vol. 1962).

The rationale in *Garey* and the instant case for offering protection to the corporation and its stockholders is subject to question. The model act was designed and enacted primarily to remedy the deficiencies in the old law.⁴⁴ Thus, it would generally seem that to allow these remedial provisions to apply to existing corporations would give greater protection to the shareholder's interest than to arbitrarily restrict such provisions on the basis of the formal distinction of whether or not the state is a party to the charter provision.⁴⁵ The rationale espoused in these Utah cases is based on a misconception concerning the nature of the restraint imposed by the contract clause of the federal constitution. As it is generally interpreted today, the Constitution does not prohibit the state from performing its sovereign functions,⁴⁶ one of which is to enact reasonable laws regulating corporations.⁴⁷ Pursuant to such a function, the state, without a reservation-of-power clause, should be considered to have authority to alter the terms of any contract when in the interest of the public, regardless of whether or not it is a party.⁴⁸ By limiting the efficacy of the state's reserve power to only those situations in which sufficient public interest is shown, the Utah court has recognized no authority arising from the reservation-of-power clause that the state did not already possess as sovereign. The additional limitation on the state's authority to alter only those charter provisions to which it is a party appears to restrict the exercise of state sovereign power. Although the court's discussion in the instant case is limited to the effect of a reservation-of-power clause, by denying the applicability of the removal statute to existing corporate charters, the court has, in effect, restrained the exercise of state power to regulate corporations. Thus, if *Garey* and the instant case are followed, the effect of the state's reservation-of-power

⁴³ Also, the historical reasons for the development of restraints on state reserve power are no longer present. At the time of the cases developing these restraints, the only manner in which the corporate charter could be amended was by directly petitioning the legislature for a special law amending the charter. The history of this type of amendments abounds with fraud and corruption working injustice on the minority stockholder — thus suggesting the reason for the majority view on the contract argument stated in note 24 *supra*. The annotation to article 16, §§ 1, 7, 10, found in *Purdon's Penna. Statutes Annotated*, illustrates that, in response to this injustice, Pennsylvania, as most other states, enacted constitutional provisions that prohibit the legislature from passing special or private laws amending corporate charters. *E.g.*, PA. CONST. art. III, § 7, art. XVI, §§ 1, 7, 10; UTAH CONST. art. VI, §§ 26(16), art. XII, §§ 1, 3, 5. Another judicial development, in addition to placing constitutional limitations whenever the reserve power may be exercised, restrains the selfish exercise of controlling corporate power by imposing equitable limitations on the amending power. LATTIN, CORPORATIONS 511-15 (1959).

⁴⁴ Garrett, *Foreword to MODEL BUSINESS CORPORATION ACT* (Rev. 1950).

⁴⁵ It would appear that the court should at least examine the interests involved in each case to determine whether they have been enhanced or impaired by the provisions of the new act that are in question. A balancing-of-interests approach would seem to be much more reasonable than deciding that a certain provision will never apply to a corporation that was in existence before the passage of the new act. Some authorities contend that the court should not even have to go so far as to examine the interests in each case but that if the provision in the new law is "reasonable," the court should uphold the provision without further inquiry. See note 21 *supra* and accompanying text.

⁴⁶ *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945); *Hale, supra* note 21 at 872-92; see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

⁴⁷ HENN, CORPORATIONS § 93 (1961).

⁴⁸ *Denver & R.G.R.R. v. City & County of Denver*, 250 U.S. 241 (1919); *Great No. Ry. v. Minnesota ex rel. Clara City*, 246 U.S. 434 (1918); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877); LATTIN, CORPORATIONS 499 (1959).

clause will be completely nullified, and the sovereign power of the state to regulate corporations will be somewhat restricted.

To avoid the multitude of problems inherent in having to apply both the new law and provisions of the repealed corporation act and to follow the United States Supreme Court and weight of authority,⁴⁹ the Utah court should overrule the *Garey* case. This may be done on the basis of either a modern interpretation of the federal constitution contract clause or a consistent approach in the application of the "contract theory." The reservation-of-power clause, as part of the law in effect, should be considered to be incorporated into the contracts of all interested parties,⁵⁰ and their constitutional right of protection from impairment of contract obligations may be deemed to have been waived.⁵¹ The instant case should not provide a serious obstacle to overruling *Garey* because the court's discussion of the constitutionality of the new law was based on a hypothetical possibility and was, therefore, mere dictum.⁵²

R. J. L.

⁴⁹ See notes 13 & 14 *supra*.

⁵⁰ See note 12 *supra*.

⁵¹ LATTIN, CORPORATIONS 501, 507 (1959).

⁵² See note 19 *supra*. Thus, while the dictum in the instant case is criticized, the decision is not questioned; the directors should not have been removed by a mere majority vote that was less than two-thirds' vote of the stock represented at the meeting.

BOOK REVIEWS

State Administrative Law, by FRANK E. COOPER. A research project of the American Bar Foundation and the University of Michigan Law School. Indianapolis: The Bobbs-Merrill Co., 1965. 2 vols. Pp. 796 (plus appendix). \$35.00.

This useful work combines what might have been a number of monographs. It deals with four general subjects, the last of which accords with the title of the publication. In inverse order of importance to the student or practitioner, these approaches are as follows:

I

The first three of the twenty chapters are abbreviated views of what might be called administrative polity in the United States. After a highly personal and drastically expurgated chapter on "Historical Perspective," there are fifteen pages about the ephemeral separation of powers. The third of these preliminary chapters deals with "Delegation of Powers — The Necessity of Controlling Administrative Discretion." As the secondary title suggests, it is a more or less official statement into which have been inserted some comments on the subject of standards used in administrative enabling acts. Professor Cooper assumes that these should be "meaningful," *i.e.* "furnish a rigid, clearly defined, or objective standard."¹ Despite some failures to measure up to that goal, he first finds them useful but then predicts their demise.² We are not told, by this author or others, just what will or should take their place. However, these introductory chapters are by no means an integral part of the book.

II

The greater part of the work, which follows those essays, might be called a tract in support of the Revised Model State Administrative Procedure Act adopted by the Commissioners on Uniform State Laws. Of course it is not in any sense a critical analysis of that revised model. It is a promotional piece, studiously produced. Nevertheless, persons interested in considering the adoption or revision of laws of this kind will find the book indispensable.

Several comments might be made here. The authors (for there were at least two of them)³ are indebted to the one state study in this field.⁴ When the original model act was adopted in 1946, suggestion that state studies should come first was brushed off.⁵ However, as a consequence, which the present work does not stress, it was published as a "model" rather than a "uniform" proposal, meaning that the subject is not one upon which conformity among the states is

¹ Pp. 55, 43.

² *Ibid.*

³ See pp. xii, 6.

⁴ That is BENJAMIN, *REPORT ON ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942), p. vii, "a light shining in the wilderness."

⁵ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *HANDBOOK* 86-95 (1946).

deemed necessary or even desirable.⁶ In this connection and also in view of the prefatory emphasis on the distinguishing characteristics of state administration, it is something of a paradox that the revised model in most of its language paraphrases the federal Administrative Procedure Act.⁷

III

A third, unique, and praiseworthy aspect of this work is the comparison of state legislation in this field. The book does not attempt to furnish a concordance to all state organic legislation on administrative law topics, but it does furnish a valuable comparison of the general administrative procedure acts of the states point by point.⁸ Since administrative law is basically conditioned by statutory provisions or enabling acts, such an analysis is not only a work of great labor but invaluable. Professor Cooper is quite aware of the need for further such comparisons within each state of course, as exemplified by his following statement of the subject of so-called "statutory" judicial review:

In most instances, the statute authorizing a state agency to decide contested cases also provides a method for judicial review of the agency's determinations. In many states, a baffling heterogeneity of methods exists. For example, in a survey made in Michigan some years ago it was noted that ten methods of appeal were provided with respect to the eight agencies which produced most of the grist for the judicial mill. Further examination of the salient features of these ten statutory appeal procedures disclosed wide disparities and complete lack of uniformity. There were five alternate requirements as to the court to which the appeal should be taken, and five divergent methods of applying to the reviewing court. Three dissimilar provisions existed as to the record on which the appeal was to be heard. The matter of obtaining an interim stay order, pending decision on appeal, was treated in four different ways. Compounding the confusion, one statute provided with deceptive simplicity that appeals from the Aeronautics Commission should be prosecuted "in the manner provided for the review of the orders of other administrative bodies of this state," thus giving counsel a wide, if illusory, choice of methods.⁹

Here is a virgin field for state-by-state studies, which might well begin by one for the national government. It may take the creation of an Administrative Law Institute to do it, but it would be of more immediate value than all the decisional law studies in Christendom.

⁶ *Ibid.*; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 603 (1952). For the difficulties in and consequences of adapting the original model act in a particular state, see McFarland & Boyd, *The General Administrative Agencies Act*, 46 VA. L. REV. 808 *passim* (1960).

⁷ Pp. 1-5. The change to a parallel approach is apparent on comparison of the original model of 1946 with the revision of 1961. The official prints of both are annotated to the federal act. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 202-17 (1946); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 206-23 (1961). The latter text is also an appendix to the work here reviewed, pp. 803-24.

⁸ See, for example, pp. 95-105 *passim*.

⁹ P. 603; see p. 5.

IV

Lastly, and of major interest for practitioners, are the sometimes extensive analyses of current state decisional administrative law which are dispersed throughout the book. Here the researcher will find more than is to be found in the legal encyclopedias — more pertinent cases (which results from a paging of state reporters for the period 1950–1963) as well as more penetrating analysis. (Older state authorities are often noted.) There are breakdowns into sections on state cases respecting civil service, labor relations, licensing, taxation, unemployment compensation, utilities, workmen's compensation, zoning, etc.

No doubt the plan of the work was rigidly confined to state administrative law. However, the reader will find frequent mention of the federal Administrative Procedure Act. There are also occasional references to decisions of the federal courts even though they are usually older opinions from which likely language is quoted or noted. The whole would have benefited by a more extensive comparison of state decisional law with federal decisional law. But law writers, even when aided by the national professional organization and a prominent law school, can only do so much at a time. Readers and reviewers should expect no more.

The detailed table of contents makes this book a most usable tool for the seeker after state case law. Therein Professor Cooper, his assistants, and sponsors have performed an important service to the profession.

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Drafting the Union Contract, by LEROY MARCEAU, edited by RAYMOND E. BJORBACK. New York: Little, Brown & Co., 1965. Pp. 321. \$12.50.

No area of labor law has been more neglected and is more needful of expert attention than that dealing with the mechanics and techniques of drafting a meaningful labor agreement. To fully cover the end result of the collective-bargaining process would take volumes. This work, however, by the labor law counselor at Standard Oil Company of New Jersey is a noteworthy effort to improve the frequently ambiguous, prolix, and unconnected documents linking management and the employees' bargaining representative.

Although the title might improperly be interpreted as a reference for unions only, the material presented will serve as a valuable aid and guide to both management and union representatives in spelling out the intentions and agreements reached through negotiation in a clear, concise, and workable style. The work is presented in an interesting and understandable form and Mr. Marceau's approach demonstrates experience and insight as to the advertencies which the draftsman must heed. A succinct characterization of the purpose of a labor agreement appears at chapter III (§ 3.1, p. 16) :

Since the purpose of the contract is to state legal rights and duties, it seldom, if ever, involves narration, description, interrogation, or an appeal for action. It contains no pathos, no overtones, no inspiration, no

humor, no emotional impact. A style that is magnificent when probing human nature would be wrong in a contract. The draftsman has no occasion to use the language of grandeur or of poetry. Word music only distracts. Imagery confuses. Metaphor misleads. Nor, on the other hand, has he any occasion to use folksy, chatty, or conversational language.

To convey his meaning (and nothing more) in a way that contract readers will understand, the draftsman adopts a style that is formal, precise, direct, simple, and austere. Any embellishment would be not only unnecessary but potentially harmful. Unnecessary wording and even unnecessary connotation may create an inference going beyond the bare right or duty that the parties want to set forth. Understatement, overstatement, indirect statement, are forms of misstatement. Plain statement alone serves the purpose. Imply nothing that you do not express.

In addition to being a good narrative, the study is also designed to serve as a reference work. This latter aim is aided by an exceptionally thorough and well-arranged table of contents (using numbered references), index, and appendices.

Following a brief introductory chapter, the author spells out some preliminary considerations worth noting, such as awareness of preexisting plant and industry rules, and also suggests helpful procedures for the initial draft. By separate chapter, he then analyzes and illustrates why attention should be given to various aspects of the agreement including, among others, "Style, Choosing the Word, Simplifying the Clause, Arranging Paragraphs, The Outline, Incumbency, The Employee's Duty, Rates and Settlement of Disputes." As an example, in his chapter on style he advises (p. 19) :

<i>Don't say</i>	<i>Say</i>
make an application	apply
extend recognition to	recognize
give a promotion	promote
come to an end	end

He also suggests affirmative rather than negative sentences. Instead of "nothing in this contract requires any employee to work overtime," he recommends that "any employee may refuse to work overtime" (p. 23). By specific suggestions throughout the work, the author succeeds in demonstrating how to effect a more concise and intelligible contract.

The contractual grievance and arbitration procedures so important since the famous *Lincoln Mills* and *Steelworkers Trilogy* cases¹ is well presented (p. 216) as is the chapter, "Amendments and Separate Agreements" (p. 285). The popular pattern of bargaining on an industry-wide basis has made these vehicles prevalent in order to achieve agreement on local issues. Thus, an awareness of the problems incident to such side agreements is important.

¹ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

All too often the labor agreement which must be construed is a helter-skelter arrangement of clauses poorly drafted and lacking continuity. A fundamental problem in changing such agreements stems from the fact that the document, albeit ambiguous and obscure, may have been used for many years. Where no serious dispute has resulted, the parties are understandably distrustful of change. Very often lack of conflict signifies nothing more than exceptionally good relations between management and the union which continues despite, not because of, their contract. In this connection, the paragraph on "Arranging the Paragraphs in Order" can serve as a key (p. 67). Very often the parties, while resisting other changes, will agree to a sensible rearranging, subdividing, and indexing of the paragraphs. Once salutary results are manifest, the parties are likely to be more receptive to other improvements.

As is usual in works of this type, the author sets forth the optimum in drafting a labor agreement. In actual practice, time, and cost factors, existing relations, preconceived ideas, and union and company policies often will prevail over the best of intentions. This does not, however, distract from the value of this book. Obviously, no single study can hope to cure all of the problems involved in drafting a labor agreement to reflect properly what was intended. However, many existing labor problems might have been avoided had the labor agreements been drafted with this book as a guide.

Member of the Utah Bar

Robert M. Yeates

UTAH LAW REVIEW



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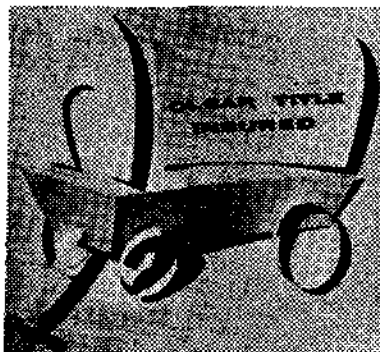
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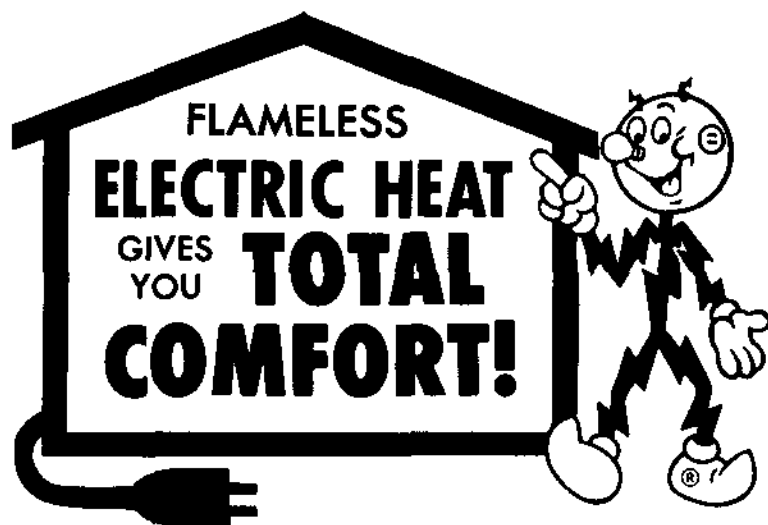
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